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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

April 1989

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Part III (Compliance) of the manual, which has been updated in its entirety, is being issued out of sequence. An updated index to this manual may be provided at a later date.

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Within the next several months, updated Parts I (ULP) and II (Representation) will be available as well.

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NATIONAL LABOR RELATIONS BOARD

CASEHANDLING MANUAL

(PART THREE)

COMPLIANCE PROCEEDINGS

April 1989

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Introduction

This manual relates to compliance proceedings and is Part Three of a three-part casehandling manual system. Part One relates to unfair labor practice proceedings and Part Two relates to representation proceedings.

Purpose of Manual

This manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to powers delegated to him/her by the Board and his/her authority under Section 3(d) of the Act. It is designed only to provide procedural and operational guidance for the Agency's staff in administering the National Labor Relations Act, and is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the law. The guidelines are not rulings or directives of the General Counsel or the Board and are not a form of authority binding on the General Counsel or on the Board.

10500–10514 *General Principles and Procedures Applicable to Compliance*

10500 *Definitions and Responsibilities*

10500.1 *Compliance Defined:* The term "compliance" refers to the effectuation, in any case, of the terms of a settlement agreement, Board order, or court judgment enforcing a Board order. If a Board order (or eventual court judgment) dismisses the complaint, no action—other than that called for in losing a case—is required by the Region. This section is concerned with action to be taken by the Region in securing compliance in those cases when the agreement, order, or judgment requires that certain actions be taken by the respondent.

10500.2 *Compliance Officer Defined:* The term "compliance officer" refers to the Regional Office person so designated and to any agent assigned to perform compliance functions in connection with a case.

10500.3 *Regional Duties and Responsibilities:* The basic effectiveness of the Agency is dependent on securing prompt and complete compliance. Therefore compliance cases are an important part of the caseload of the Regional Offices. The compliance officer in the Region is responsible for:

a. Initiating and following up on compliance efforts

b. Analyzing the steps necessary to constitute compliance

c. Policing the compliance efforts

d. Reporting the status of compliance efforts

To the extent that it is possible, the Region should secure *voluntary* compliance. To the extent that further proceedings are necessary (e.g., backpay, enforcement, contempt) the Region is further responsible for:

e. Making appropriate recommendations for further necessary formal action

f. Participating, when appropriate, in the institution and maintenance of formal action

10502 *Initiation of Compliance Efforts*

10502.1 *Efforts To Secure Voluntary Compliance:* The procurement of voluntary compliance is as deserving of effort as the voluntary settlement of unfair labor practice charges. Whether or not specific details about compliance requirements have been agreed on, an early initial attempt should be made to procure a consent to compliance in principle.

10502.2 *Following Informal Settlement:* In the case of informal settlement signed by the charging party, instructions to comply should be sent the charged party immediately on approval of the agreement. When the charging party does not join in the agreement, such instructions should be withheld until the appeal period expires or until the action of the Region is sustained on appeal if an appeal is filed.

10502.3 *Following Administrative Law Judge's Decision:* In the case of an administrative law judge's decision, if the General Counsel decides not to file exceptions, the positions of the parties on voluntary compliance should be obtained immediately, without awaiting entry of the Board order. When a commitment to voluntary compliance is obtained and no exceptions are to be filed, preparations for effectuation of compliance should commence.

Any actions toward compliance taken prior to entry of the Board order, including any period of the posting of the notice as recommended by the administrative law judge, shall be accorded full recognition as steps taken in compliance with the order of the Board as ultimately entered.

10502.4 *Following Board Order:* In the case of a Board order, whether based on a formal settlement agreement or a full record, compliance should be sought on receipt of the order. However, the respondent shall be required to comply with the affirmative provisions of the Board's order only to the extent that it has not already done so.

10502.5 *Following Court Order:* In the case of full enforcement by a court, compliance efforts should be initiated immediately on entry of the judgment. If the court only partially enforces, compliance should ordinarily be sought immediately with respect to the portions of the order enforced. If certiorari is sought, compliance efforts on those portions of the judgment covered by the petition for certiorari should

be deferred until after final disposition of the matter by the Supreme Court only if there has been a stay of the mandate. "Neither the filing nor the granting of a petition for certiorari operates as a stay . . . with respect to the execution of the judgment . . . ."[1] Absent such a stay of the mandate, compliance should be sought notwithstanding the filing of a petition for certiorari. Accordingly, a noncomplying respondent should be advised that contempt proceedings will be recommended when a stay is not sought or has been denied.[2]

10502.6 *Following Supplemental Court Judgment Liquidating Amount of Backpay or Other Monetary Obligations (Recording Judgments):* In any case in which a court judgment has issued fixing the specific amount of backpay due or other monetary liability of a respondent, and the respondent has not made prompt arrangements for the full satisfaction of its liability satisfactory to the Region, the judgment should, in the absence of circumstances convincing the Region that payment in full is assured, be recorded against the respondent's real property and, if permitted by state law, personal property, in order to create a lien on that property. (See sec. 10643.3 for procedures regarding recording of judgments.)

10502.7 *Suspension of Compliance Efforts for Appeals, Adverse Decisions and Certiorari:* Compliance efforts should not be undertaken during the appeal period of a unilateral settlement, or until the Agency has determined whether to appeal unfavorable decisions of administrative law judges or the courts, or while a motion for reconsideration of a Board decision is pending, without the caveat to the respondent that the compliance requirements may ultimately be altered upward. Although a respondent seeking certiorari should be asked to comply with the portions of the Board's order that have been enforced and are not involved in the certiorari proceeding, clearance from the Division of Operations Management should be sought before compliance in matters related to the certiorari proceeding is demanded when there has been a stay of the mandate by the court of appeals.

10504 *Compliance Procedures*

10504.1 *Contact With Respondent:* The initial effort of the Region to procure compliance may be made by telephone contact but

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[1] *McCarty v. Allen*, 688 F.2d 581, 586 (8th Cir. 1982), citing *Stern & Gressman, Supreme Court Practice*, at 847 (5th Ed. 1978).

[2] *NLRB v. Illinois Popcorn Co.*, 96 LRRM 2857 (D.C. Cir. 1977).

should also take the form of a letter following Pattern 8 or Pattern 8a. (See sec. 12079, Clerical Procedures Manual.) The letter offers the services of the office and designates the compliance officer who will be available to render assistance. The letter should be actively pursued. An answer should be procured, in writing if possible. Questions should be brought to light and answered. Cooperation should be extended in analyzing compliance requirements before a decision to comply is made.

On occasion, a respondent, before agreeing to comply, will ask which, if any, discriminatees would refuse an offer of reinstatement. Some may state, quite frankly, that their compliance will depend on the answer. The Regional Office must discourage the conditioning of compliance on the failure of a given individual to return to work and should advise the respondent that, in any event, the offer must be made to those individuals specified in the agreement or order. On the other hand, the compliance officer, in appropriate circumstances, should undertake to ascertain what a given discriminatee's present circumstances are and advise the respondent. The compliance officer should remind the respondent that all that can be ascertained is the discriminatee's state of mind under present circumstances; there cannot be any assurance that the actual making of the offer will not bring about a change. In speaking to the discriminatee, the compliance officer must not attempt to influence the discriminatee's decision.

In relaying the information to the respondent, the compliance officer should again advise that there is no guarantee that there will not be a change in the discriminatee's mind when the offer is ultimately made.

If a respondent, in advance of deciding whether to comply, wants to know the cost of financial reimbursement obligations imposed by the order, a rough computation should be made, but any use of estimating techniques (sec. 10568) or other qualifications on its accuracy should be clearly stated, and the respondent advised it is subject to correction. When efforts to secure voluntary compliance are unsuccessful, the respondent's reasons should be ascertained, in writing if possible.

10504.2 *Analysis of Requirements Generally:* The burden of determining the steps to be taken in compliance with an administrative law judge's recommended order, a Board order, or a court judgment rests with the Regional Director, subject to clearance with the Division of Operations Management in certain situations (sec. 10514). The parties

should be made to understand that the Regional Director and/or the General Counsel is acting as the Board's agent and that all agreements with respect to compliance are in the name of the Board and designed to carry out the Board's intent that its order be properly implemented, and that in appropriate circumstances the authorization of the General Counsel and the Board may be required before approving an agreement with respect to compliance.[1] (See secs. 10164.6 and 10172.3 for formal settlements.)

10504.3 *Compliance Function Not To Be Delegated to Parties:* The Region should maintain control of compliance efforts and not relinquish them to the parties. This is needed to make sure that interests of persons not parties are fully protected.

10504.4 *Information From Discriminatees, Social Security Administration, Interim Employers, and Others:* The compliance officer (or the staff member assigned to a particular case to secure compliance) will verify that steps required to be taken at the time of issuance of complaint have been taken (sec. 10269). If they have not, remedy any oversight immediately. The compliance officer is responsible for requesting that each discriminatee maintain records of interim earnings/expenses and search for work and submit that information to the compliance officer on a regular basis. The compliance officer is further responsible for receiving this information from the discriminatee and for placing the information in the case file for future use. The Social Security Administration (SSA) is one source of information for discriminatees' interim earnings. Such information is secured by submission of Form NLRB-4180 properly executed by the discriminatee. Although legally the burden of proving deductions from gross backpay is on the respondent, the Regional Office, in the interest of securing adjustment of compliance issues through informal procedures as well as in narrowing issues in the event a supplemental hearing is held, will concede the admitted or otherwise verified amounts of interim earnings. The discriminatees' paycheck stubs, withholding tax forms (W-2's), and income tax returns, as well as information supplied by interim employers in reply to the Regional Office's request, also furnish reasonably accurate evidence of interim earnings. These sources are especially useful when discriminatees were employed at work not covered under the Social Security Act, when a settlement is being worked out before information can be secured from the SSA, or when due to the social security

[1] *Jacobs Transfer*, 227 NLRB 1231, 1234 (1977); *Ace Beverage Co.*, 250 NLRB 646, 648 (1980).

processing timelag, the information is not yet available. (See sec. 10590 for content and analysis of Social Security reports.)

Again, although legally the burden of proving exclusions from the backpay period because of discriminatees' unavailability for work is on the respondent, the compliance officer will investigate this aspect of the case also, preliminarily by personal or telephonic interviews with discriminatees, to help in making a sound determination of net backpay for settlement purposes.

Additional detailed instructions concerning the investigation of backpay are set forth in sections 10530 through 10626.

10504.5 *Report by Respondent:* The Board order (or administrative law judge's decision) normally gives the respondent a specified number of days in which to report in writing to the Regional Director what compliance steps have been taken. At the outset, the compliance officer should mention that such report will be expected.

10504.6 *Policing:* The Region is responsible for seeing that the requirements of the Board order (or administrative law judge's decision) are fulfilled. Active assistance to the respondent in carrying out the affirmative provisions of the order and careful analysis of the initial compliance report by the respondent constitute the first steps in policing compliance. In certain respects further affirmative checks from time to time are desirable and necessary but, otherwise, the operation is more or less passive. A respondent who has taken the steps required by the affirmative provisions should be presumed, in the absence of complaints, to be complying with the negative provisions.

10504.7 *Routine Notice Checks:* One or two routine checks of posted notices should be made by regional personnel who, in the course of other business, are in the neighborhood of the posted notices during the posting period. If it appears that the posting is inadequate, either because of location of notices, seasonality of operations, etc., or if side notices are present, appropriate corrections should be recommended. (See also sec. 10526.6.)

10504.8 *Position of Parties:* Whenever compliance issues arise, the parties' respective positions should be established in the form of their own writings if possible; failing this, their respective positions

should be summarized in letters from the assigned agent containing requests for confirmation.

At all times, the file should be maintained in such condition that (a) with a minimum of oral briefing, another agent may be assigned to take over the compliance phase of a case, and (b) it may serve as the base for any necessary supplemental formal proceeding in compliance.

10505 *Monitoring Respondent's Ability to Comply with Remedy Sought by Agency:* At all times during the processing of any case, the Region should continually assess the respondent's current ability and, when possible, future ability to comply with the remedy sought by the Agency. At any stage of the case, the Board agent to whom the case is assigned for processing assumes responsibility for monitoring the respondent's ability to comply. Following the issuance of the administrative law judge's decision, the case may remain with the trial attorney for this purpose or may be reassigned to the compliance officer (secs. 10334.1, 10407.5, and 10430–10434). The Region should be alert to any evidence or actions by the respondent to impair its assets, to cease doing business, to sell or transfer its operations or assets, or to otherwise render itself unable to comply with the remedial provisions of the Board's order. Such issues may be raised by the charging party or discriminatees, or by the respondent when asserting inability to pay or comply as a defense to noncompliance, or may come to the Region's attention through independent sources such as the local newspaper. In any event, such issues should be promptly and thoroughly investigated, including contacting the respondent and other parties. The investigation may be triggered by actions such as the following:

a. Claim of inability to pay or comply raised by any party

b. Creation of alter ego

c. Sale or potential sale of all or part of business

d. Potential or actual successor

e. Siphoning of assets

f. Lack of cooperation by the respondent in providing evidence supporting its claim of inability to pay or comply

g. Closure of operation

h. Bankruptcy

Such actions by the respondent, which may occur at any stage of the processing of the case, raise policy, legal, and factual issues warranting a determination concerning how best to proceed against the respondent to protect the backpay and prevent total noncompliance at the current or at a later stage of the case. (See sec. 10643 specifically regarding injunctive relief, protective restraining orders, notice to third parties with potential derivative liability, and recording of judgments.) For example, a protective restraining order under Section 10(e) or 10(j) may be appropriate, additional investigation to locate assets may be warranted, security agreements may be necessary, or discovery may be required in the face of the respondent's lack of cooperation. If the Region desires information on the methods used to locate assets or on the various protective measures available at a particular stage of the case, the Region may consult with the Contempt Litigation Branch. The Region need not await issuance of a court judgment before contacting the Contempt Branch, as immediate preventive measures may be required prior to completion of the various steps of litigation.

On assignment of a case to compliance, the compliance officer should immediately assess the respondent's ability to comply. Thus, when the respondent does not respond to communications regarding compliance or when the respondent's ability to comply is not obvious or cannot be verified, the Region should investigate the matter and should make a determination about the respondent's continued ability to comply. Such investigations and determinations should not await the issuance of the court judgment. The charging party, and discriminatees as appropriate, should be advised to notify the compliance officer immediately of any significant change in the respondent's financial condition or operations, or its identity. (See secs. 10407.5 and 10430.)

10506 *Enforcement Proceedings:* When a respondent has refused or has demonstrated an unwillingness to comply with a Board order, a recommendation for enforcement proceedings should be initiated forthwith. It is not necessary to submit a recommendation for enforcement when a petition for review has been filed by the respondent because in such cases the Division of Enforcement Litigation routinely files a cross-application for enforcement. However, when the charging party files a petition for review, the Division of Enforcement Litigation

only files an application for enforcement when the Region specifically recommends enforcement, as the Region may have concluded that the respondent has complied with the Board's order. (For recommendation for enforcement notwithstanding compliance, or when there appears to be noncompliance with a Board order resulting from charges filed in another Regional Office, see below.)

Otherwise appropriate recommendations normally should be made only after affirmative efforts to procure compliance, above and beyond the sending of the initial letter, have been made. A respondent may evince unwillingness to comply by requesting repeated conferences or otherwise delaying the proceedings.

10506.1 *Enforcement Recommendation of Regional Director:* The Regional Director is responsible for initiating recommendations for enforcement of Board orders.

If circumstances indicate that immediate injunctive relief under Section 10(e) should be considered, an appropriate explanation and recommendation should be made to the Division of Enforcement Litigation with a copy to the Division of Operations Management (sec. 10643.1) (see also sec. 10505).

The recommendation for enforcement should be made to the Division of Operations Management and the respondent should be notified of the recommendation by letter from the Regional Director. A copy of this letter should be sent to the charging party so that it will be apprised of the progress of the case. The efforts made to procure compliance should be set forth in detail in the memorandum recommending enforcement, to which should be attached the compliance officer's report, the regional attorney's opinion, and pertinent correspondence including any notification to the respondent of the enforcement recommendation. To expedite processing of the case, the Region should include the most current name, address, and telephone number of the respondent's counsel or a statement that the respondent has not been or no longer is represented by counsel, as appropriate. Duplicate exhibits should be sent to Washington by transmittal slip addressed to Chief, Case Records Unit, with a notation "Enforcement proceedings recommended."

And, even though the recommendation may be adopted, the Region is not thereafter foreclosed from seeking compliance; on the contrary, any development that indicates possible success in achieving compliance

without enforcement should be pursued. In all cases, it is essential not only that every effort be made to secure voluntary compliance *before* recommending the matter for enforcement, but also that such efforts should continue thereafter.

When recommending enforcement, notwithstanding an offer or even the achievement of compliance, the memo should set forth in detail the reasons why enforcement is needed. If there is a dispute over what constitutes compliance, or if the Region regards enforcement necessary notwithstanding actual compliance, the memo should comprehensively cover these issues.

In those situations when the investigation of a charged party's prior history reveals that meritorious allegations may constitute noncompliance with an unenforced Board order that originated in another Regional Office, the Regional Director investigating the new charge should contact the Region where the Board order originated and solicit the views of the Regional Director concerning the appropriateness of enforcement proceedings in light of the new charge. The Regional Director investigating the new charge should submit to the Division of Operations Management a memorandum containing those views and a recommendation concerning the appropriateness of enforcement proceedings. Absent authorization, the Region should not proceed to issue complaint or to settle those allegations of the charge that may constitute noncompliance. (See generally sec. 10508.)

10506.2 *Operational Goal for Enforcement Recommendations:* Following issuance of a Board order, or sooner in the case of an uncontested judge's decision, the Region should promptly contact the respondent to ascertain its position with respect to compliance. Even where discussions concerning compliance are necessary, a decision by the respondent concerning its intention should be made promptly so that the Region normally can submit, absent unusual circumstances, its recommendation for enforcement within 30 days of the receipt of the Board's order in the Regional Office. If the recommendation can be made even more promptly, the Region should do so. In test of certification 8(a)(5) cases, the Region should make every effort to submit its enforcement recommendation as soon as possible, preferably within 1 week following the receipt of the Board's order by the Region.

10506.3 *Compliance Developments After Enforcement Recommended:* Any change or progress with respect to compliance should be

reported immediately to the Appellate Court Branch. The Division of Operations Management should also be notified only if the change or progress is significant; for example, when the Region is seeking to withdraw or suspend its enforcement recommendation. Notification to Division of Enforcement Litigation ordinarily should be by telephone; a confirming memorandum is unnecessary unless the recommendation concerning enforcement is withdrawn or suspended.

10506.4 *Responsibility for Instituting and Processing Enforcement Proceedings:* Once enforcement proceedings have been authorized, the actual instituting and processing will be handled by the Division of Enforcement Litigation. For action to be taken on receipt of a court judgment see section 10502.5. Should a respondent file a motion for reconsideration with the Board after enforcement has been recommended, the Region should notify the Appellate Court Branch promptly.

10506.5 *Responsibility for Supreme Court Proceedings:* In the event of a circuit court judgment failing to enforce a Board order in whole or in part, the decision as to further action, including Supreme Court action, will be made in Washington. (See secs. 10502.5 and 10502.7.) The Region will be advised of this determination and the parties advised by the Region.

10508 *Complaint of Noncompliance with Unenforced Board Order*

10508.1 *Generally:* If a report of noncompliance is received, the party voicing the complaint should be asked to specify the defects in compliance and should be asked to submit whatever evidence is available. If there appears to be color to the complaint, appropriate investigation should be made. (Regarding complaint of noncompliance with enforced Board orders, see sec. 10509.)

10508.2 *Criteria for Filing New Charge:* Whether or not a *new* charge covering the matters now being complained of should be filed depends on the circumstances. Ordinarily, the better practice is to suggest that a new charge be filed in view of the fact that there has, as yet, been no court enforcement of the Board order. Generally, a new charge should be filed when the complaint of noncompliance may also involve the occurrence of a new unfair labor practice. For example, when the respondent has been ordered to cease and desist from interrogating its employees concerning union activities, a new occurrence of

8(a)(1) conduct, although considered as noncompliance with the cease-and-desist provisions of the order, may also be a new unfair labor practice violation. The new occurrence, if meritorious, cannot be remedied under the existing Board order which provisions cover only previously found violations. Under these circumstances, a new charge may be filed. A new charge should be filed when the incident that is the subject of the complaint may appear *related* to one of the affirmative provisions of the order, but is not *clearly* encompassed by the terms of the order. For example, the order requires the respondent to affirmatively reinstate Jane Doe and to cease and desist from discharging employees in violation of the Act; John Smith, not involved in the original 8(a)(3) case, is now discharged, allegedly for union activities. Under the circumstances, a new charge may be warranted because Smith's discharge is not clearly encompassed by the order. The investigation of the complaint of noncompliance and of the new charge should proceed simultaneously. *In any event*, whether a new charge is filed, the Region should consider the appropriateness of further enforcement proceedings.

10508.3 *Possible New Unfair Labor Practice:* Based on the criteria in section 10508.2 if there is reason to believe that the conduct now complained of may not constitute noncompliance but may constitute a *new* unfair labor practice, the complaining party should be advised of this and of the possibility that unless a new charge is filed the 10(b) period may run. Or, of course, the complaining party may, on its own initiative, file a new charge.

10508.4 *Regional Action; New Charge Filed:* If a new charge is filed against a respondent subject to an unenforced Board order, the matters should, of course, be investigated. If it appears, from the investigation, that the issuance of a complaint on the new charge is justified, and the meritorious allegations may constitute noncompliance with the order, the matter should be submitted to the Division of Operations Management for clearance. The transmittal memorandum should contain regional recommendations with respect to the new charge and the existing order. Absent authorization, the Region should not proceed to issue complaint or to settle those allegations that may constitute noncompliance with the order. (See sec. 10508.6 for situations in which the Board order originated in another Regional Office.) (For cases in which there is an outstanding judgment, see sec. 10509.)

10508.5 *Regional Action: New Charge Not Filed:* On the basis of the investigation, the Region should take appropriate action: Advise the complaining party that the terms of the order are being complied with or advise the respondent of action necessary to remedy the defect. If all efforts to achieve voluntary disposition of the dispute fail, a memorandum seeking clearance for desired action (e.g., closing the case), recommending further steps (e.g., enforcement proceedings), or seeking advice should be sent to the Division of Operations Management. (See secs. 10514, 10629, and 10772 when clearance from the Division of Operations Management is required before closing a case.)

10508.6 *Noncompliance with Unenforced Board Order Originating in Another Regional Office:* When the investigation of a charged party's prior history reveals that meritorious allegations appear to be noncompliance with the remedial provisions of an unenforced Board order that originated in another Regional Office, the Regional Director investigating the new charge should contact the Region where the Board order originated and solicit the views of the Regional Director concerning the appropriateness of enforcement proceedings in light of the new charge. The Regional Director investigating the new charge should submit to the Division of Operations Management a memorandum containing those views and a recommendation concerning the appropriateness of enforcement proceedings. Absent authorization, the Region should not proceed to issue complaint or to settle those allegations of the charge that may constitute noncompliance with the order.

10509 *Complaint of Noncompliance with Enforced Board Order; or New Charges Filed Against Respondent Subject to Outstanding Judgment*

10509.1 *Generally:* If a report of noncompliance with a court judgment is received, the party voicing the complaint should be asked to specify the defects in compliance and should be asked to submit whatever evidence is available. If there appears to be color to the complaint, appropriate investigation should be made. (Regarding investigation of noncompliance with unenforced Board order, see sec. 10509.) If the complaint of noncompliance is meritorious and is not resolved voluntarily and expeditiously, the Region should, absent an order staying the judgment (sec. 10502.5), submit the matter with a recommendation whether contempt proceedings are warranted (sec. 10510). *However, when a new unfair labor practice charge has been filed, the Region should follow the procedures set forth in sections 10509.2 and*

10509.3. In view of the heavier burden of proof in contempt proceedings, the Region, in the investigation of noncompliance, should secure witness affidavits and documentary evidence whenever possible. In addition to the initial written requests for compliance following issuance of the judgment, subsequent requests for compliance should be confirmed in writing, including any deadlines for compliance or statements that contempt proceedings may be recommended, absent compliance. Such documentation is important to support a contempt recommendation. (See sec. 10510 generally.) If it appears that contempt proceedings may be recommended, the Region should document the time and expenses necessary to investigate and process the case (see sec. 10510.6, see generally secs. 10522.4 and 10529).

10509.2 *Conduct Not Clearly Covered by an Outstanding Judgment; Possible New Unfair Labor Practice:* If the conduct comprising the complaint of noncompliance may also constitute a new unfair labor practice, the complaining party should be advised of this and of the possibility that unless a new charge is filed the 10(b) period may run. Further, a new charge should be filed when the incident that is the subject of complaint is not clearly encompassed by the terms of the decree. Of course, the complaining party may, on its own initiative, file a new charge. The investigation of the complaint of noncompliance and of the new charge should proceed simultaneously.

10509.3 *New Charge Filed Against a Respondent Subject to an Outstanding Court Judgment:* At any time following the issuance of a judgment, charges may be filed that allege conduct by a respondent that is subject to an outstanding court judgment. When such charges are filed, regardless of whether they are accompanied by a specific complaint of noncompliance with the court judgment and regardless of whether the court judgment resulted from charges filed in another Regional Office (sec. 10509.1), the Region should follow these procedures:

a. *Submission to Contempt Litigation Branch:* Following the investigation, if it appears that a charge has merit and if the conduct is arguably encompassed by the provisions of the judgment (see sec. 10510.3(a)), the matter should be submitted by memorandum to the Contempt Litigation Branch, Division of Enforcement Litigation, with a copy to the Division of Operations Management. The memorandum should contain a regional recommendation concerning the appropriate course of action (e.g., issuance of complaint or

institution of contempt or alternative proceedings). (See sec. 10510 generally and secs. 10510.2 and 10510.4 for contents of memorandum.)

Any doubt whether or not the allegation is arguably encompassed by the judgment should be resolved in favor of submitting the case for contempt consideration.

b. *Deferral of Issuance of Complaint or Settlement:* The Region should *not* issue complaint *or* settle the case, either by informal settlement agreement or non-Board adjustment, until the General Counsel has decided whether to recommend, and the Board has decided whether or not to authorize, the institution of contempt proceedings. The Region is authorized to approve unsolicited withdrawal requests submitted by the charging party in those situations in which the investigating agent did not participate in securing the adjustment of the case. If contempt is authorized, *no* administrative proceedings should be instituted without the authorization of the Contempt Litigation Branch. Thus, there may be circumstances in which, for policy reasons, following review of the Region's submission by the Contempt Litigation Branch, the Region may be authorized to proceed administratively, notwithstanding the Board's authorization for contempt proceedings (e.g., when the same facts demonstrate violations of different sections of the Act, only some of which are covered by the judgment, or when 10(j) or 10(l) relief is needed).

10509.4 *Complaint of Noncompliance Clearly Encompassed by Provisions of the Judgment: New Charge Not Warranted:* If the complaint of noncompliance involves conduct clearly encompassed by the remedial provisions of the judgment, the filing of a new charge may not be warranted. For example, the respondent has not complied with one of the affirmative provisions of the judgment, such as the notice posting, expungement, or reinstatement requirement. Under these circumstances, the filing of a new charge would not be warranted. *However*, if it is not clear whether the conduct complained of may constitute a failure to comply with an affirmative provision (valid reinstatement) or a violation of a cease-and-desist provision (subsequent discharge for union activities), the better course of action is to suggest that a new charge be filed (sec. 10509.2).

10509.5 *Regional Action; New Charge Not Filed:* On the basis of the investigation, the Region should take appropriate action: Advise the complaining party that the terms of the judgment are being complied with or advise the respondent, with confirmation in writing, of action necessary to remedy the defect. If the Region concludes that the respondent is not complying and all efforts to achieve voluntary and expeditious compliance fail, the Region should submit a memorandum recommending further action (e.g., contempt or other alternative proceedings) to the Contempt Litigation Branch, with a copy to the Division of Operations Management.

10509.6 *Backpay Cases:* On refusal to comply with the backpay provisions of a court judgment, the appropriate course of action by the Region will be determined by the status of the case and the nature of the respondent's backpay liability, considered in conjunction with the Region's assessment of any inability-to-pay defense raised by the respondent (see sec. 10628.2).

a. *Liquidated Versus Unliquidated Judgment:* The court judgment may enforce a Board order containing a generalized "make whole" remedy, or it may state specific amounts of backpay or other monetary awards due to named discriminatees or other entities, such as a benefit trust fund. The latter form of judgment is usually entered only after supplemental backpay proceedings have been conducted, whereas the former is analogous to an interlocutory judgment of a court fixing liability but leaving the amount thereof for future determination.[1]

b. *Liquidated Judgment; Amount Due Admitted or not Controvertible; Amount Due Controvertible:* In the event of the respondent's refusal to comply with a liquidated judgment, the Region should submit the matter to the Contempt Litigation Branch, with a copy to the Division of Operations Management, with its recommendation concerning the appropriateness of contempt proceedings. (See sec. 10510 generally.) (But see sec. 10509.6 for cases where the respondent has raised an inability-to-pay defense for its refusal to comply.)

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[1] *Home Beneficial Life Insurance Co. v. NLRB*, 172 F.2d 62, 63 (4th Cir. 1949); *NLRB v. New York Merchandise Co.*, 134 F.2d 949, 952 (2d Cir. 1943); *NLRB v. Deena Artware*, 361 U.S. 398, 411 (1960) (concurring opinion).

Generally, a refusal to comply with the make-whole provisions of the underlying order when there is no liquidated judgment will not warrant contempt proceedings.[2] Similarly, an unliquidated make-whole order is generally too indefinite to serve as a basis for supplementary execution or garnishment proceedings (sec. 10510.8) or to create a judgment lien against the respondent's property (sec. 10643.3).[3] *However*, in those exceptional circumstances when there can be no legitimate "controversy" over the amounts due under an unliquidated make-whole judgment, it may be appropriate to recommend contempt proceedings. For example, when the backpay is based solely on the respondent's own records, such as in a case involving refusal to apply the contract wages and benefits or refusal to forward to the union dues deducted from employee paychecks. (See sec. 10628.2.)

However, when a legitimate controversy does exist over the amounts due, the Region may issue a backpay specification.

c. *Financial Inability to Pay Raised as a Defense:* When the respondent is claiming financial inability to comply with the provisions of a judgment, the respondent has the burden to show "categorically and in detail" why it is unable to comply,[4] and has been unable to comply at any time since the entry of the judgment. Financial hardship caused by compliance with the order is not a valid basis for refusal to comply.[5] Accordingly, whenever a respondent asserts financial inability to pay, the Region should thoroughly investigate the respondent's financial condition, including but not limited to, a review of financial statements and tax records, a listing of the respondent's assets and encumbrances thereon, the existence of potential alter egos or successors with liability, the potential siphoning of assets to the respondent's representatives, and an assessment of the respondent's ability to pay by installment payment.

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[2] *NLRB v. Deena Artware*, 261 F.2d 503, 510 (6th Cir. 1958), revd. on other grounds 361 U.S. 398 (1960). Accord: *NLRB v. New York Merchandise Co.*, supra, 134 F.2d at 952.

[3] State law on this point should be carefully researched, however, as exceptions may exist.

[4] *NLRB v. Trans Ocean Export Packing*, 473 F.2d 612, 616 (9th Cir. 1973).

[5] *NLRB v. Sally Lyn Fashions*, 112 LRRM 3039, 3053 (Special Master's Report, 1982), adopted 112 LRRM 3088 (3d Cir. 1982) (sum of present resources of all kinds must be insufficient to even partially satisfy the judgment, even if all property is sold or mortgaged); *NLRB v. Pyroking, Hay & Grain*, 115 LRRM 3108, 3110 (Special Master's Report, 1983), adopted 115 LRRM 3115 (7th Cir. 1984).

1. When the Region is satisfied that the respondent has no assets available, and the case is otherwise appropriate for closing, the Region should submit the matter to the Division of Operations Management, with a recommendation regarding closing of the case. In the event there has been a liquidated judgment in the case, the Region should ordinarily register the judgment in a U.S. district court and record the judgment with appropriate state authorities or a lien, to protect against future acquisitions by the respondent, even when prospects for eventual satisfaction of the judgment appear minimal (sec. 10643.3).

2. If, after investigation, the Region determines that the respondent has sufficient assets to satisfy or partially satisfy its liability, the Region should proceed to obtain a supplemental judgment liquidating the amounts due when a legitimate controversy exists concerning the amounts. When the amounts are liquidated, or admitted or uncontrovertible, the Region should submit the case to the Contempt Litigation Branch, with a copy to the Division of Operations Management, with a recommendation about the appropriateness of contempt proceedings. However, when there is a liquidated judgment, the Region should also include in its submission, a recommendation concerning the appropriateness of supplementary proceedings (sec. 10510.8), in lieu of or in addition to contempt proceedings. Further, if it appears that the respondent may take action to impair or dissipate its assets, the Region should consider whether or not to recommend protective injunctive relief (secs. 10643 and 10505).

3. In the event that the Region is unable to determine whether assets are available, and the respondent has failed to cooperate in the investigation, the Region should initiate or continue backpay proceedings to obtain a liquidated judgment, if no liquidated judgment has issued and unless the amounts are uncontrovertible. However, while backpay proceedings are going forward, the Region should submit the matter to the Contempt Litigation Branch with a copy to the Division of Operations Management, with a recommendation concerning the appropriateness of discovery proceedings to determine the respondent's financial condition and to identify assets from which the judgment can be satisfied.[6] Discovery may be conducted to uncover concealed or fraudulently transferred assets,[7] and may be obtained against third parties, insofar as it relates to the existence or transfer of the respondent's assets.[8]

10509.7 *Regional Action; Reinstatement Issues:* In the event the complaint of noncompliance involves a reinstatement issue, the Region, following a complete investigation of the matter and absent expeditious and satisfactory resolution of the issues, should submit the case to the Contempt Litigation Branch, with a copy to the Division of Operations Management, with a recommendation whether contempt proceedings are warranted to secure compliance with the Board's reinstatement order. Examples of reinstatement issues include: (a) discriminatee has not received a valid offer of reinstatement from the respondent; (b) discriminatee has not been validly reinstated by the respondent; or (c) the respondent refuses to offer reinstatement for discriminatee based on asserted lack of work or unfitness of discriminatee for work. Thus, *any* controversy concerning reinstatement, absent satisfactory and expeditious resolution of the matter, should be submitted for contempt consideration. (See sec. 10510 generally.) The Region should defer issuance of a backpay specification until the General Counsel has decided to rec-

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[6] When there is a liquidated judgment, discovery would ordinarily be conducted in the district court pursuant to Rule 69 of the Federal Rules of Civil Procedure. When there is no supplemental judgment, a discovery order would be sought from the court of appeals which enforced the Board's make-whole order. This is so because the only discovery authorized by Rule 69 appears to be that which is in aid of execution of a liquidated money judgment. See *Gross v. JFD Mfg. Co.*, 31 F.R.D. 256 (E.D.N.Y. 1962).

[7] *Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 561 (S.D.N.Y. 1977).

[8] *Magnaleasing, Inc. v. Staten Island Mall*, supra, 76 F.R.D. at 562 (nonparty stockholdet of debtor and related corporations); *Cuisson Corp. v. West Country Bldg. Corp.*, 62 F.R.D. 331, 334–335 (E.D.Pa. 1974) (debtor's officer and sole stockholder); *Cerami v. Robinson*, 85 F.R.D. 371 (S.D.N.Y. 1980) (discovery concerning debtor's wife's income); *G-Fours, Inc. v. Miele*, 496 F.2d 809 (2d Cir. 1974) (debtor's transfers to spouse); but see *Strick Corp. v. Thai Teak Products Co.*, 493 F.Supp. 1210, 1217–1218 (E.D.Pa. 1980) (alter ego).

ommend or the Board has decided whether or not to authorize contempt proceedings (see sec. 10628.2).

10510 *Contempt and Other Ancillary Proceedings*

10510.1 *Recommendation; Contempt Instituted by Private Parties:* Whenever the respondent refuses to comply with either the affirmative or cease-and-desist provisions of a court judgment (secs. 10509.1, 10509.5–.6), or when the Region concludes that new charges alleging conduct arguably encompassed by the provisions of a court judgment have merit (secs. 10509.1–.4), the Region should submit the matter to the Contempt Litigation Branch, Division of Enforcement Litigation, with a copy to the Division of Operations Management, with its recommendation whether contempt or other proceedings should be instituted. (For backpay cases and reinstatement issues, see secs. 10509.6, 10509.7, and 10628.2.) In those situations when the respondent's initial refusal to comply is remedied expeditiously and the Region is satisfied that the respondent is complying, the matter need not be submitted to Contempt, unless a meritorious charge has been filed (sec. 10509). (See also sec. 10505 for circumstances that may warrant contempt or other protective measures.) (See generally secs. 10522.4, 10529, and 10628.2.)

No court has ever permitted a private party to institute contempt proceedings to compel compliance with a judgment enforcing a Board order.[1] Accordingly, whenever a party to the case indicates that it has filed or intends to file its own contempt proceedings with the court, the Region should immediately notify the Contempt Litigation Branch, with concurrent notification to the Division of Operations Management.

a. *Notice to Parties:* Before the Region recommends the institution of contempt proceedings, it should notify the respondent, absent circumstances that make such notice inadvisable, of the Region's determination to make such a recommendation to the Office of the General Counsel. (For example, an unusual circumstance may exist in which the Region is considering enforcement of a backpay judgment through supplementary garnishment or execution proceedings, and there may be a substantial risk that the respondent, if put on notice of the Region's intentions, would be tempted to dissipate assets.)

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[1] *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264–265, 269–270 (1940); *Auto Workers v. Scofield*, 382 U.S. 205, 220–221 (1965).

b. *Failure of Respondent or Other Parties to Cooperate in Compliance Investigation; Postjudgment Discovery; Other Administrative Action:* When the Region is unable to determine whether or not a respondent or a third party is in compliance with an outstanding judgment due to the failure of the respondent and other parties to cooperate in the compliance investigation, the matter should be submitted to the Contempt Litigation Branch, with a copy to the Division of Operations Management, with a recommendation concerning the appropriateness of postjudgment discovery or administrative action, such as investigative subpoenas (sec. 11770). The recommendation should document efforts taken by the Region to obtain the information, the respondent or third party's noncooperation, and the relevance of the information, and it should be accompanied by the relevant Regional Office files (sec. 10510.4).

If determined that discovery proceedings are warranted, they generally are to be conducted by the Region, under the general direction of the Contempt Litigation Branch. Requests for advice should be directed to the Contempt Branch, as well as any problems encountered and the results obtained as a result of the discovery proceedings.

10510.2 *Compliance Developments After Submission of Contempt Recommendation:* Any change or progress with respect to compliance following the Region's recommendation should be reported immediately to the .Contempt Litigation Branch. Any substantial change or progress should be confirmed by memorandum to the Contempt Litigation Branch, with a copy to the Division of Operations Management.

Whenever contempt or other ancillary proceedings have been recommended or are pending, and a new charge has been filed against the same respondent or a related party, the Region should act on the charge, if meritorious, in the manner set forth in sections 10509.4 and 10510.1. In those instances when the Region determines, after investigation, that a charge is not meritorious, the Region should first notify the Contempt Litigation Branch in writing, with a copy to the Division of Operations Management, of its determination and of its reasons therefor before advising the parties of its determination and its intention to dismiss the charge.

10510.3 *Criteria Governing Choice Between Contempt or Further Board or Other Proceedings:* Each case, of course, should be judged on its own merits. Although no single factor should necessarily be consid-

ered conclusive, the Region should evaluate each of them in determining whether or not to recommend the institution of civil or criminal contempt proceedings:

a. *Whether the Alleged Violation Falls within the Natural Meaning of the Judgment:* When there is an outstanding judgment literally covering the alleged violation, a contempt recommendation is prima facie indicated, even though the violation is not wholly like, or does not grow out of, the offense or dispute in the basic case.[2] In considering the alternative courses of action against the respondent, the scope of the issues in the basic litigation should be broadly construed and the full natural meaning given to the language of the order.[3]

b. *Whether the Evidence Meets the Standard of Proof for Establishing Contempt:* The evidentiary standard for establishing proof of civil contempt is by "clear and convincing evidence."[4] The standard in criminal contempt proceedings is proof "beyond a reasonable doubt."[5] Thus, the evidentiary burden is heavier in contempt than in administrative proceedings, although the legal standard is the same.[6] In civil contempt, a respondent's good faith or lack of willfulness is not a defense.[7]

c. *Whether More Extensive Remedies, Available Only in Contempt, Are Deemed Necessary to Ensure Compliance; Whether a Board or Other Available Proceeding Is Apt to be More Successful or Expeditious Than Contempt in Achieving Compliance:* When the respondent is recidivist or has engaged in particularly egregious or widespread misconduct, the "stronger medicine" of contempt may be required in order to obtain compliance.[8]

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[2] *Containair Systems Corp. v. NLRB*, 527 F.2d 1166, 1173–1174 (2d Cir. 1975).

[3] *NLRB v. Alterman Transport Lines*, 587 F.2d 212, 215–216 (5th Cir. 1979); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192–193 (1949); *NLRB v. Leslie Metal Arts Co.*, 104 LRRM 3138, 3141 (6th Cir. 1980); *NLRB v. Winn-Dixie Stores*, 353 F.2d 76, 77 (5th Cir. 1965); *NLRB v. Hod Carriers*, 228 F.2d 589, 592 fn. 3 (2d Cir. 1955); *West Texas Utilities Co. v. NLRB*, 206 F.2d 442, 449 fn. 32 (D.C. Cir. 1953), cert. denied 346 U.S. 855 (1953).

[4] *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1183 (D.C. Cir. 1981).

[5] Ibid.

[6] *Oil Workers v. NLRB*, 547 F.2d 575, 585 (D.C. Cir. 1976).

[7] Id. at 581; *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *NRLB v. Trailways*, 729 F.2d 1013, 1017 (5th Cir. 1984).

[8] *NLRB v. Crown Laundry*, 437 F.2d 290, 294 (5th Cir. 1971). See also *NLRB v. Electrical Workers IBEW Local 3 (Northern Telecom)*, 730 F.2d 870, 881 (2d Cir. 1984) (Board has a statutory duty to impose "broader and more stringent remedies" against a repeat offender); *NLRB v. Florida Steel Corp.*, 648 F.2d 233, 240 (5th Cir. 1981); *NLRB v. Operating Engineers Local 825*, 430 F.2d 1225, 1230 (3d Cir. 1970); *Steelworkers (H. K. Porter Co.) v. NLRB*, 363 F.2d 272, 275 (D.C. Cir. 1966) (a "succession

Prospective noncompliance fines, reimbursement of costs and attorney fees, detailed bargaining, or other reports and other remedies not available in administrative proceedings are routinely directed by the courts in most contempt cases. On the other hand, when the conduct, although violative of an outstanding decree, may be isolated, and when the possibility of prevailing may be less if tried before a special master not versed in labor law rather than an experienced administrative law judge, contempt proceedings may be a less desirable alternative (e.g., uncorroborated, low-level, de minimis 8(a)(1)'s; mixed-motive 8(a)(3) conduct not concerning the discriminatees involved in the underlying unfair labor practice proceedings). Likewise, although the refusal of a respondent to furnish payroll records to compute backpay is contumacious,[9] ultimate satisfaction of the make-whole order may be achieved more expeditiously in certain circumstances if the Board forgoes contempt to obtain the respondent's records, and instead, the Region issues a backpay specification based on secondary sources respecting employee earnings. On the other hand, contempt may be the only recourse when the alleged conduct violates the remedial provisions of a decree but not the Act (e.g., notice posting, reinstatement, compliance reports, etc.), or when the 10(b) period has run without a charge having been filed, inasmuch as the 10(b) limitation applies only to administrative proceedings and not to contempt.[10]

d. *Whether Supplementary Proceedings Should Be Instituted in lieu of Contempt in Backpay Collection Cases:* In backpay collection cases in which the amounts owing are liquidated in a supplemental judgment, the Region should consider the advisability of instituting supplementary proceedings as an alternative to, or in conjunction with, contempt proceedings (secs. 10510.7 and 10643.4). Accordingly, in all such collection cases, the Region should discuss in its recommendation those factors, including state law requirements, which militate in favor of or against the utilization of supplementary proceedings (sec. 10510.7). If it is concluded that supplementary proceedings should be instituted, normally they will be conducted by the Region, with the advice of the Contempt Litigation Branch. In exceptional circumstances when the amounts of backpay are not liquidated but there can be no dispute about the amounts owing,

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of proceedings resulting in Board orders cast in statutory language is not the answer" when interference with protected rights persists).

[9] *NLRB v. Trans Ocean Export Packing*, 473 F.2d 612 (9th Cir. 1973).

[10] *Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 243 (5th Cir. 1964), (contempt regarded as part of original case, not as an independent proceeding); *NLRB v. Southwestern Colorado Contractors' Assn.*, 447 F.2d 968, 970 (10th Cir. 1971). See also *NLRB v. Schill Steel Products*, 480 F.2d 586, 596 (5th Cir. 1973).

contempt rather than supplementary proceedings may be the appropriate vehicle to utilize. (E.g., when the respondent concedes the accuracy of the Region's backpay computation, or the amount of dues to be reimbursed is ascertainable with complete accuracy from the respondent's own withholding records.)[11] However, generally, if the amount owing is not fixed by the judgment, execution proceedings would not be appropriate.[12]

e. *Whether a Significant Issue Is Peculiarly One for the Exercise of the Board's Expertise:* Difficult issues of first impression are usually not presented to the courts in a contempt context for the obvious reason that the Board's position should be supported by a rationale formulated by the Board, rather than one of its attorneys in a contempt proceeding. Similarly, questions of a representational nature are best resolved by the Board inasmuch as they concern an area of special Board expertise.[13] Mere complexity of the law, however, is not a reason to forgo contempt.[14] Nor does the fact that an administrative procedure is available in any way vitiate the Board's power to seek enforcement of a court decree through contempt proceedings.[15]

Rather, the Board's decision to invoke the court's contempt power is in itself an exercise of the Board's discretion in light of its expertise in achieving compliance with its orders.[16]

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[11] Cf. *Fleming v. Warshawsky*, 123 F.2d 622, 625 (7th Cir. 1941); *Cooper v. Dasher*, 290 U.S. 106, 109–110 (1933); *Warner Holding Co. v. Creedon*, 166 F.2d 119, 121–122 (6th Cir. 1948).

[12] 30 Am.Jur.2d *Executions* § 5 (1967); 49 C.J.S. *Judgments* § 458 (1947); 46 Am.Jur.2d *Judgments* § 242 (1969); 47 Am.Jur.2d sec. Judgments §§ 1053, 1056 (1969); Annotation, 55 ALR2d 72 723 (1957); 33 C.J.S. *Executions* § 6 (c) and (d) (1942). Compare *Printing & Paper Trades Auxiliary Workers v. Cuneo Eastern Press of Pa.*, 72 F.R.D. 588 (E.D. Pa. 1976), affd. 549 F.2d 796 (3d Cir. 1977) (execution allowed up to an amount which debtor's counsel had admitted during course of hearing was the least amount owing under the judgment, despite the fact that further proceedings would be required to determine the precise backpay due) with *International Controls Corp. v. Vesco*, 535 F.2d 742, 747–748 (2d Cir. 1976) (execution order invalid when fixed money judgment was deemed not a final judgment because it left open possibility that creditor could establish additional damages in subsequent proceedings). As a practical matter, it is highly unlikely that a marshal would execute on property without some prior determination of what is due. *Printing & Paper Trades*, supra, 72 F.R.D. at 592 fn. 8. Therefore, even when a respondent concedes the amount of backpay owing under an interlocutory make-whole judgment, it may be necessary to bring an action in the district court to compel execution if the marshall refuses to act; such course would not necessarily be a more expeditious means of enforcing a judgment than contempt. Accordingly, in most cases it is highly desirable to promptly obtain a liquidated backpay judgment.

[13] *Computer Sciences Corp. v. NLRB*, 677 F.2d 804, 808 (11th Cir. 1982).

[14] *NLRB v. Teamsters Local 282*, 428 F.2d 994, 1000–1001 (2d Cir. 1970).

[15] *NLRB v. Teamsters Local 282*, 72 LRRM 2098, 2113 (1969) (report of Special Master), approved 428 F.2d 994 (2d Cir. 1970); *NLRB v. John S. Swift & Co.*, 302 F.2d 342, 345 (7th Cir. 1962); *NLRB v. Schill Steel Products*, 480 F.2d 586, 595–596 (5th Cir. 1973); *NLRB v. C.C.C. Associates*, 306 F.2d 534, 539 (2d Cir. 1962).

[16] *Auto Workers v. Scofield*, 382 U.S. 205, 221 (1965); *NLRB v. Kohler Co.*, 351 F.2d 798, 806 fn. 10 (D.C. Cir. 1965); *NLRB v. Union Nacional de Trabajadores*, 611 F.2d 926, 933 (1st Cir. 1979).

f. *Whether the Decree Has Grown too Stale to Warrant Contempt Proceedings:* Judgments enforcing Board orders are permanent in duration and do not lose their efficacy with age[17] and sustained compliance does not diminish their vitality.[18] "[S]ustained obedience . . . is just what the law expects."[19] Nevertheless, the age of the decree is to be taken into account and, after a long period of quiescence, a new violation may warrant administrative proceedings rather than contempt, especially if the misconduct is isolated or not egregious.

g. *Whether Immediate 10(j) or 10(l) Relief Is Needed; Concurrent Administrative and Contempt Proceedings:* In situations when immediate 10(j) or 10(l) relief is necessary or warranted, concurrent contempt proceedings are generally not appropriate because some courts do not favor duplicative litigation.[20] However, there may be cogent reasons for proceeding both administratively and in contempt in a given case, e.g., when the facts are identical but the remedial relief sought may differ. For example, 8(a)(1) conduct is alleged in the contempt petition while the same evidence is concurrently introduced as background to support an allegation of 8(a)(3) discharge in an administrative proceeding, either because the outstanding decree does not prohibit 8(a)(3) conduct, or the allegation is not supported by clear and convincing evidence.[21]

10510.4 *Regional Office Submissions Regarding Contempt and Other Ancillary Proceedings:* Regional recommendations to Washington concerning contempt and other ancillary proceedings, such as discovery, protective restraining orders, and supplementary proceedings, should be prepared as thoroughly as feasible, supported by documentary proof or affidavits whenever possible. The regional recommendation should contain the following:

a. The report of the compliance officer, the recommendation of the regional attorney and Regional Director;

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[17] *NLRB v. Reed & Prince Mfg. Co.*, 196 F.2d 755, 761 (1st Cir. 1952) (11 years); *U.S. v. Swift & Co.*, 189 F.Supp. 885 (N.D.Ill. 1960), affd. 367 U.S. 909 (1961); *Wirtz v. Credit Bureau of South Florida*, 51 CCH L.C., 31, 658 (S.D.Fla. 1964).

[18] *SEC v. Thermodynamics*, 319 F.Supp. 1380, 1383 (D.Colo. 1970), affd. 464 F.2d 457 (10th Cir. 1972), cert. denied 410 U.S. 927 (1973).

[19] *Walling v. Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957).

[20] Compare *NLRB v. Murray Ohio Mfg. Co.*, 60 LRRM 2257 (6th Cir. 1965), with *NLRB v. Schill Steel Products*, 480 F.2d 586, 595 (5th Cir. 1973).

[21] *NLRB v. Leslie Metal Arts Co.* (6th Cir. Nos. 72-1227 and 74-1505, unreported order of Feb. 5, 1980).

b. A copy of correspondence to the respondent, notifying it of the recommended action, if contempt is recommended (but see sec. 10510.1(a) for special circumstances);

c. A statement citing the portions of the judgment for which the Region believes there has been noncompliance, or to which the status of compliance is unknown, if discovery is recommended;

d. A statement of all pertinent facts that support its recommendation, with reference to relevant documentary evidence or affidavits (see sec. 10509.1);

e. A statement of any defenses raised by the respondent, or otherwise anticipated from the circumstances of the case, with the Region's analysis with respect thereto, including a statement of its reasons for believing the asserted defenses are without merit, and any supporting citations;

f. A recital of all efforts made to achieve compliance or to obtain information respecting the status of compliance, if unknown;

g. A statement concerning the status of any related legal proceedings.

The recommendation should be accompanied by the Regional Office compliance or other files concerning postjudgment conduct, including, in addition to the foregoing, copies of the pertinent Board and court orders; affidavits, documentary evidence, and correspondence; and all file notes or memoranda relating to the respondent's alleged noncompliance with the judgment.

10510.5 *Notice to Parties of Board Authorization to Institute Contempt Proceedings:* On receipt of the Board's authorization to institute contempt proceedings, the Region should notify the parties of the decision telephonically, with confirmation in writing.

If contempt proceedings are not authorized, the Region will be notified, either telephonically or in writing, and the Region should orally notify the charging party and the respondent. If the charging party requests a written statement of the reasons for the decision not to seek contempt, the request, which should also be in writing, should be forwarded immediately to the Contempt Litigation Branch for reply. The charging

party should be notified that a copy of a summary statement or detailed explanation, whichever is requested, setting forth the reasons, will also be served on the respondent and the other parties to the proceeding.

10510.6 *Documentation of Expenses of Investigating Contempt Allegations and Processing Contempt Proceedings:* Courts routinely require the respondents who have been adjudged in civil contempt to reimburse the Board for its costs and expenses, including attorneys' fees and other personnel costs, incurred by the Region, as well as Washington Headquarters staff.[22] When the court awards costs to the Board, the Board, through the Contempt Litigation Branch, must prepare and submit to the court a verified statement of such costs so that the court may fix the amount of the award. If the respondent contests the Board's claim, the matter is usually referred to a special master for hearing.[23] Accordingly, in all cases in which contempt has been recommended or is anticipated, the Region should maintain detailed, contemporaneous time records reflecting work performed in the "investigation, preparation, presentation and final disposition" of the contempt proceedings.[24] The records should reflect the case name and number; Board agent name; description of work performed;[25] date work performed; and hours or fractional hours spent performing the specific task.[26] Such time records should be maintained separately for each case by attorneys, field examiners, clerical employees, and other compliance personnel performing work on the case. Copying costs should similarly be recorded, and copies of travel vouchers showing travel expenses related to contempt proceedings should be retained in the case file for future use in supporting the Board's award of costs.

10510.7 *Regional Assistance to Contempt Litigation Branch:* The Region should render every assistance to the Contempt Litigation Branch in preparing for and prosecuting any contempt case authorized by the Board or other ancillary proceedings. As time is often of the

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[22] *Dallas General Drivers Local 745 (Farmers Cooperative) v. NLRB*, 500 F.2d 768, 771–772 (D.C. Cir. 1974); *NLRB v. Operating Engineers Local 825*, 430 F.2d 1225, 1229 (3d Cir. 1970), cert. denied 401 U.S. 976.

[23] *NLRB v. Teamsters Local 85*, 103 LRRM 2795 (9th Cir. 1970).

[24] *NLRB v. Railways*, 729 F.2d 1013, 1024 (5th Cir. 1984).

[25] *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); *Crowe v. Lucas*, 479 F.Supp. 1258, 1260 (N.D.Miss. 1979) (fee reduced when timesheets gave insufficiently precise description of work done); *National Assn. of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (casual, after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees).

[26] For example, "drafted letter dated _____ to Respondent's Counsel requesting compliance," or "visited respondent's facility to check posting of remedial notice."

essence in these matters, the Region should respond promptly to requests for assistance and additional investigation.

10510.8 *Alternative Procedures in Backpay Collection Cases:*

a. *General Content of Recommendation to Washington:* In backpay collection cases in which the amounts owing are liquidated in a supplemental judgment,[27] the Region should consider the advisability of instituting supplementary proceedings (including garnishments and writ of execution), pursuant to Rule 69 of the Federal Rules of Civil Procedure, as an alternative to or in conjunction with contempt proceedings (sec. 10510.3(d)). In those cases when alternative procedures are warranted, the Region should submit its recommendation to the Contempt Litigation Branch, with a copy to the Division of Operations Management. The recommendation should highlight those factors that militate in favor of or against such proceedings. Rule 69 requires that supplementary proceedings be conducted in accordance with the practice or procedure of the State when the judgment is sought to be enforced; thus, the recommendation should also be set forth whether there is any state practice or procedure that makes the initiation of supplementary proceedings inadvisable and what remedies are available, in that jurisdiction. The recommendation should be accompanied by the files and other relevant materials, together with appropriate statutory and case citations (sec. 10510.4). (See also sec. 10643.3.)

b. *Criteria for Instituting Supplementary Proceedings:* Supplementary proceedings may prove to be a quicker means of obtaining satisfication of a backpay judgment. Accordingly, they are prima facie indicated when there is a substantial likelihood that the respondent will go out of business without providing sufficient means to satisfy its monetary obligations. When backpay liability exists and has not been promptly satisfied, attachment of assets may have a carryover effect of inducing compliance with other nonmonetary provisions of the judgment. Sound judgment must be exercised in deciding to levy on particular assets so as not to cause an otherwise sound enterprise to go out of business. Supplementary proceedings may also be instituted contemporaneously with contempt proceedings when the known attachable assets are less than the amount of the outstanding liability, or when the respondent has also violated

[27] *NLRB v. New York Merchandise Co.*, 134 F.2d 949 (2d Cir. 1943); *NLRB v. Deena Artware*, 261 F.2d 503, 510 (6th Cir. 1958); rev. on other grounds 361 U.S. 398 (1960).

nonmonetary provisions of the judgment. However, such proceedings may be inappropriate in some jurisdictions where the respondent's attachable property is held in the entireties; where it has been transferred to an alter ego or other entity not named in the judgment; or where the backpay has not been liquidated in a supplemental backpay proceeding (sec. 10510.3(d)).[28]

c. *Conduct of Supplementary Proceedings:* If determined that supplementary proceedings are warranted, they generally are to be conducted by the Region. Requests for advice should be directed to the Contempt Litigation Branch, as well as any problems encountered and the results obtained, as a result of the supplementary proceedings. Clearance for supplementary proceedings beyond levy and postjudgment discovery[29] should likewise be sought from the Contempt Litigation Branch.

d. *Registration of Judgment:* The Federal registration statute (28 U.S.C. § 1963) provides that a judgment cannot be registered until it has become final by appeal or the expiration of time for appeal.[30] The time within which a party may petition for certiorari expires 90 days after entry of the court of appeals' judgment, unless an extension of time is granted. Registration may be effected by filing in the U.S. district court(s), in the district(s) in which the respondent's property is located, a certified copy of the court of appeals' judgment, together with a certificate of finality (Form 101). The Contempt Branch will provide the Region with a certified copy of the judgment and the certificate of finality to enable the Region to register the judgment in the district court(s). If the judgment enforcing the Board's supplemental order does not specify on its face the amount of backpay, a certified copy of the Board's order must be attached to the certified judgment in order to register it. For a more extensive discussion of Federal and state registration statutes, consult sec. 10643.3 and Memorandum OM 84-62, dated 30 August 1984 entitled "Collecting Money Judgments: Alternatives to Contempt-Draft Guidelines" and the attached charts reflecting state laws governing judgment liens.

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[28] See 46 Am.Jur.2d *Judgments* § 242 (1969); 47 Am.Jur.2d sec. Judgments §§ 1053, 1056 (1969); 30 Am.Jur.2d *Executions* § 5 (1967); 49 C.J.S. *Judgments* § 458 (1947); Annotation, 55 A.L.R.2d 723 (1957).

[29] Illustrations of these types of proceedings include district court litigation to avoid fraudulent conveyances, proceedings for contempt of district court orders, motions for sanctions under Rule 37 of the Fed.R.Civ.P., and similar matters.

[30] When the respondent had no right of appeal, such as when the judgment is by consent, the judgment is ripe for registration on rendition. See authorities cited at sec. 10643.3(c) fn. 14.

e. *Refusal of District Court to Register Judgment:* If, after supplementary proceedings are authorized, the district court clerk refuses to register a court of appeals' judgment, the Region should notify the Contempt Litigation Branch, which will seek an order from the court of appeals directing registration of its judgment.

f. *Postregistration Procedures:* When the district court clerk registers the judgment, it will be assigned a civil number. The Region should consult with the offices of the U.S. Attorney and the U.S. Marshal to determine procedures to be followed and to secure forms and samples that must be filed with the clerk or tendered to the Marshal's office. The Region should file all appropriate documents to enable the U.S. Marshal's Service to initiate supplementary proceedings in accordance with local practice and deliver all necessary marshal service forms to the marshal's office. The forms should be accompanied by a letter explaining what the Region wishes done and whom to contact if there are questions.

10510.9 *Notice to Successors of Potential Contempt Liability:* To avoid potential problems of proof of knowledge of unremedied contumacious conduct in a possible successorship or alter ego situation,[31] whenever it appears that a potential purchaser may acquire the business of a respondent when contempt proceedings are being considered or have been recommended by the Region, or authorized by the Board, the Region should notify the purchaser, in writing, of its potential liability as a successor or alter ego as appropriate. (See sec. 10643.2 and sample letter.) Any unusual circumstances or problems that would militate against such notice should be directed to the Division of Operations Management (sec. 10643.2(a)), prior to a recommendation for contempt proceedings, and to the Contempt Litigation Branch, following such recommendation.

10510.10 *Closing Case Involving Contempt Proceedings:* Whenever the Region closes or recommends closing a case in which contempt proceedings have been initiated or are under consideration, clearance should be secured from the Contempt Litigation Branch prior to closing the case (sec. 10772.2).

10512 *Advice on Compliance Problems:* The Regional Director should feel free at any time to seek advice on problems encountered

[31] *NLRB v. Metallic Lathers Local 46*, 727 F.2d 234, 237–238 (2d Cir. 1984); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185 (1973).

while securing compliance. Although the responsibility for a decision to seek advice rests with the Regional Director, disagreement with the Regional Office position by one of the parties or disagreement between the regional attorney and the Regional Director may be an *indicator* that advice should be sought. Any request for advice on compliance should contain a full statement of circumstances, the positions of the parties, and the recommendation of the Regional Director. Advice concerning novel substantive legal issues should be requested of the Division of Advice, with copy to the Division of Operations Management. (See sec. 11756 for suggested format and content.) Requests for advice concerning techniques, procedures, internal policy, and other matters should be addressed to the Division of Operations Management. (See also secs. 10505, 10509, and 10510 for those matters that should be submitted for advice or clearance to the Contempt Litigation Branch.)

10514 *Advice, Clearance, and Washington Notification Situations:* Advice, of course, is available on request. Additionally, clearance or advice should be obtained before settling or closing a case on the basis of compliance with an order, judgment, or decree on terms not in conformity with sections 10628, 10629, or 10772, or over the objections of a party, discriminatee, or claimant. The situations in which advice or clearance should be sought or notice given are enumerated in the sections set forth below, which in general deal with the following topics.

Advice or Clearance

1. Technical and substantive advice distinguished (sec. 10512)

2. Novel problems (secs. 10504.2, 10505, 10512, 10642.4, 10642.6, and 10772)

3. Inability to pay or comply questions, such as, impairment of assets, cessation or transfer of operations, alter ego/successor liability, siphoning of assets, Region may consult with Contempt Litigation Branch on most effective course of action (sec. 10505)

Complaints of Noncompliance

4. When an apparently meritorious charge has been filed concerning the same subject matter (secs. 10506 and 10508)

5. When no charge has been filed and the complaint of noncompliance has not been amicably resolved by all parties (secs. 10508.5 and 10509.6)

6. Meritorious charges involving the respondents subject to outstanding judgments (secs. 10509.4 and 10510.1)

Settlements/Compliance

7. Not conforming to prescribed standards (secs. 10528.7, 10628, 10629, 10674.1, 10674.2, and 10772)

8. Objected to or not concurred in by a discriminatee (secs. 10628, 10629, 10674.1, and 10772)

9. Cash settlement in lieu of reinstatement (sec. 10528.7)

10. Settlements predicated on preliminary estimates not based on quarterly computation (sec. 10568)

11. Withdrawal of specification based on settlement not conforming to prescribed settlement standards or objected to by any party or discriminatee (secs. 10674.1 and 10674.2).

Case Closing on Purported or Claimed Compliance

12. When objected to by any charging party or discriminatee (sec. 10629)

13. When not in compliance with the prescribed standards of sections 10628, 10629, and 10772.

14. While another proceeding is pending or court costs have not been paid (secs. 10772 and 10521)

Clearance Required

15. Acceptance of backpay, compliance, or settlement from the respondents jointly and severally liable on other than an equal proportion basis (sec. 10636.1)

16. Issuing backpay specification absent court judgment unless stipulation waiving enforcement proceedings has been obtained (sec. 10652)

17. Issuance of notice of hearing without backpay specification (sec. 10654.2)

18. Before seeking compliance with a provision concerning which certiorari proceedings have been instituted and stay of mandate has been granted (secs. 10502.5 and 10502.6)

19. Recommendation of contempt or supplementary proceedings without notice to the respondent (secs. 10510.1 and 10643.2(a))

20. Use of *lis pendens* under any circumstance other than when injunctive proceedings have been filed seeking to prevent dissipation of assets (sec. 10643.2(b))

21. Preliminary estimates of the respondent's backpay obligation not predicated on quarterly computations or based on pooled interim earnings or expenses (sec. 10568)

22. Advertising for missing discriminatees (sec. 10582.8)

23. Retaining accountant to examine books and records (sec. 10631)

24. Making discriminatees available for examination by the respondent (sec. 10634)

25. Novel methods of distributing backpay (sec. 10640.4)

26. Closing case when contempt proceedings have been instituted or are under consideration (sec. 10510.10)

27. Issuing backpay specification involving issues of reinstatement or uncontrovertible backpay (secs. 10509.6, 10509.7, and 10628.2)

Notices to Washington

28. Proffered compliance or substantial probability thereof following enforcement recommendations (secs. 10506.1 and 10506.2)

29. Motion to reconsider by the respondent following enforcement recommendation (sec. 10506.3)

30. Significant developments following enforcement recommendation (sec. 10506.2)

31. Report of investigation of meritorious charge against the respondent subject to outstanding judgment (sec. 10509)

32. Attachment and garnishment proceedings and liens filed against undistributed backpay (sec. 10646)

33. Issuance of backpay specification (sec. 10656.4)

34. Substantial or significant amendment of backpay specification (sec. 10672)

35. Reopening closed case for failure to make installment payments or to pay missing discriminatees when located (sec. 10772.3)

10521–10528 *Compliance With Specific Provisions of the Order or Settlement*

10521 *Court Costs:* United States courts of appeals often award costs to the Agency on enforcement of Board orders and these costs are made part of the mandate of the court. Accordingly, in all such cases, compliance officers should seek payment of court costs as part of their effort to obtain compliance with the other aspects of the court's mandate. Thus, in communications with the respondent's counsel, the compliance officer should emphasize that compliance with a court mandate includes payment of costs. Copies of judgments of the courts of appeals may be obtained from the Appellate Court Branch, if not received in the course of ordinary distribution. Checks in payment of costs should be made payable to the National Labor Relations Board and transmitted to the Regional Office. The Regional Office will in turn forward the check, with cover memorandum, to the Finance Branch, with a copy to the Division of Enforcement Litigation.

The Division of Enforcement Litigation maintains a record of cases pending the collection of court costs to ensure that those claims by the Government are fully paid or that the collection action is terminated by the "head of the Agency" as required by the Federal Claims Collection Act of 1966. Therefore, the Region should advise that division of the status of any such cases at the end of each calendar quarter.

Many respondents may attempt to "settle" court costs in the same manner in which offers are made to settle backpay claims. Because costs are payable to the United States Government and constitute a claim by the Government, Regional Offices should not accept a settlement offer of court costs. Such offers should be referred to the Division of Enforcement Litigation. The Region's submission should set forth the respondent's reasons for not complying fully with its court costs obligation, together with the Region's recommendation whether the respondent's offer should be accepted. If the respondent claims an inability to pay, the Region should investigate that allegation and include its findings in its submission.

Similarly, cases in which Regions are unable to obtain the payment of costs should be referred to the Division of Enforcement Litigation with a fully supported recommendation whether the collection action for court costs should be terminated. Such cases should not be formally closed on the basis of compliance until costs are paid absent notification

from the Division of Enforcement Litigation that the Board has terminated the collection action for the outstanding costs.

On notification from the Division of Enforcement Litigation that a termination of collection of court costs has been approved, or when the Region has received either payment of court costs or notification of payment from Washington, the case may be formally closed on the basis of compliance. In the latter case, the Region should send a memorandum to the Division of Enforcement Litigation advising of the case closing. The Region should note on the closed case report whether court costs were awarded, the amount of the award, the amount of any check received for court costs, and the date the check was forwarded to the Finance Branch.

10522 *Negative Provisions*

10522.1 *Generally:* Section 10(c) of the Act requires the Board, when it has found unfair labor practices, to issue, among other things, an order requiring the respondent to cease and desist from such unfair labor practices. For example, the order may require an employer to stop interrogating employees respecting union membership or encouraging or discouraging—by specific acts—membership in a labor organization. The Board will usually prohibit the respondent employer from interfering with, restraining, or coercing employees in the exercise of Section 7 rights, etc. It may, on the other hand, require a union to stop threatening nonmember employees with violence to force them to become members. It will usually also prohibit the respondent union from restraining or coercing employees in the exercise of Section 7 rights, etc.

The negative provisions, by their very nature, call for refraining from action rather than the taking of action. The Region should ascertain that the respondent understands what past acts may not now be continued or repeated. In addition, the Region should communicate to the charging party the necessity for advising the Region of the respondent's compliance with the negative provisions of the order. Better policing is afforded by alerting the charging party to its responsibility for apprising the Region of violations of these provisions, and conforms to the current practice of requiring the Region to report in the closing compliance report the charging party's position on *total* compliance.

The Region should, however, not be content to await receipt from the charging party of reports of noncompliance by the respondent but should periodically, on its own initiative, check with the charging party concerning steps taken and progress made.

10522.2 *Negative Provisions of Bargaining Order; Derivative Affirmative Obligations:* The negative aspects of a bargaining order (e.g., cease and desist from taking any unilateral action, from seeking to bargain individually, from making bargaining dependent on an unlawful demand, etc.) create self-evident obligations. Compliance with them varies according to the specific terms.

10522.3 *Cease-and-Desist Orders; Broad Order:* A broad cease-and-desist order, rather than one limited to the situation found in a case, is warranted only when a respondent is shown to have a proclivity to

violate the Act or has engaged in such egregious or widespread misconduct to demonstrate a general disregard for the employees' fundamental statutory rights.[1]

10522.4 *Regional Analysis of Compliance with Negative Provisions; Potential Contempt Issues:* Whenever a question arises concerning whether or not the respondent is violating a negative provision of the Board's order, as enforced, the Region should consider whether the alleged noncompliance or violation constitutes contumacious conduct, even when the respondent eventually agrees to comply or cease the conduct. If, in the Region's view, the "stronger medicine" of contempt is warranted in view of the respondent's dilatory compliance, the matter may be submitted to the Contempt Litigation Branch, with a copy to the Division of Operations Management, with a recommendation about the appropriateness of contempt proceedings. In those cases when the conduct appears isolated and when no charge has been filed or when the respondent has expeditiously agreed to comply, the Region need not submit the matter for contempt consideration. In those situations in which a new charge is filed, see sections 10509.2 and 10509.3.

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[1] *Hickmott Foods*, 242 NLRB 1357 (1979).

10524–10529 *Affirmative Provisions Other Than Backpay*

10524 *Generally:* The Region, in determining what steps must be taken to comply with the Board's order, will immediately be concerned with the affirmative action required. *Examples of affirmative requirements:* To disestablish a union;[1] to withdraw and withhold recognition from a union until and unless it is certified;[2] to reimburse employees for dues or initiation fees deducted or for hiring hall fees illegally exacted;[3] to delete an illegal provision from the contract;[4] to offer reinstatement;[5] to restore an employee to a layoff or preferential hiring list;[6] to notify an employer that the labor organization has no objection to the hiring of a particular individual;[7] to make whole for loss due to discrimination, etc.[8] Some of these are self-explanatory; others will be discussed in detail in separate subsections following.

10524.1 *Disestablishment:* Disestablishment contemplates a complete and permanent termination of all relationships between an employer and the affected labor organization (and any successor) having to do with wages, hours, and other working conditions. It does not necessarily mean complete dissolution of the organization although the order may bring about that result.

Disestablishment is effected by the employer's written notification to the union (sent to the last known officers, if there is doubt as to present existence) that it withdraws recognition from or will not grant recognition to the union (whichever is appropriate) and disestablishes the union as a bargaining representative for its employees.

The employer must also specifically notify employees that it disestablishes the union and that they are free to join or not to join any other union. It must perform such other affirmative acts as may be required by the order; e.g., instructions to supervisors to withdraw from membership in the union or from participation in the union's affairs.

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[1] E.g., *Carpenter Steel Co.*, 76 NLRB 670, 673 (1948).
[2] E.g., *Hershey Metal Products Co.*, 76 NLRB 695, 697–698 (1948).
[3] E.g., *Lunardi Central Distributing Co.*, 161 NLRB 1443, 1445 (1966); *J. J. Haverty, Inc.*, 139 NLRB 633, 636–637, 639 (1962), enfd. as modified 321 F.2d 130, 134–136 (2d Cir. 1963).
[4] E.g., *Woodlawn Farm Dairy Co.*, 162 NLRB 48, 54 (1966).
[5] E.g., *Lipman Bros.*, 147 NLRB 1342, 1347 (1964), enfd. 355 F.2d 15 (1st Cir. 1966).
[6] E.g., *Big Bear Super Markets*, 169 NLRB 94, 102 (1968).
[7] E.g., *Bricklayers Union No. 4 of Missouri (Masonry Builders)*, 160 NLRB 1837, 1838 (1968).
[8] E.g., *American Mfg. Co. of Texas*, 139 NLRB 815, 819 (1962), enfd. in relevant part 351 F.2d 74, 81 (5th Cir. 1965); *Lipman Bros.*, supra; *Bricklayers Local 18 (Union Counties)*, 159 NLRB 303, 311 (1966), remanded on other grounds 378 F.2d 926, 929–930 (3d Cir. 1967).

10524.2 *Successor to Disestablished Labor Organization:* In disestablishment cases, the appearance of a new labor organization may create a problem of successorship that will require affirmative policing steps. Pursuant to the existing principles of law, such questions will have to be investigated such as the circumstances surrounding the dissolution and formation of the two organizations, line of fracture, surviving vestiges, etc.

10524.3 *Reimbursement for Dues Deducted:* When an employer is found to have deducted dues payments as an incident of dominating an organization or as a means of maintaining control over it, reimbursement by employer and union to employees may be ordered by the Board.

Sums due are to be computed with reference to books and records of both employer and union; settlement of disputed amounts may be resolved by resort to procedures described in Backpay, sections 10530–10546. Like backpay, improper dues and related charges are subject to interest charges (see sec. 10623.6).

10524.4 *Resumption of Interrupted Bargaining:* When the respondent has been ordered to resume interrupted bargaining, the policing should take the form of a continued check on the status of negotiations. Accurate and complete information about bargaining conferences and interparty communications should be obtained and kept in the regional file. The Region should exercise caution, however, that its function be confined to seeing that bargaining takes place; it should not render assistance of a mediatory nature.

10524.5 *Affirmative Bargaining Order:* The usual affirmative provision is an order to bargain collectively on request with a named union or employer over working conditions covering the employees in a described unit. On issuance of such an order, the Region should notify and remind the party to whose benefit the order inures that the obligation arises only on request. Both parties should be aware that, absent special circumstances, the obligation is a continuing one.

10524.6 *Agreement in Writing:* The obligation created by another type of affirmative 8(a)(5) or 8(b)(3) provision—an order to reduce an agreement to writing or to sign a contract the terms of which have been agreed on—is self-explanatory.

10524.7 *Compliance With 10(k) Determination of Dispute:* See Unfair Labor Practice Proceedings, section 10214.

10524.8 *Unlawful Withdrawal of a Proposal During Bargaining:* When the respondent unlawfully withdraws a proposal during negotiations, absent unusual circumstances, the respondent should be required to reinstate the withdrawn proposal for a reasonable period of time.[1]

10526 *Notices*

10526.1 *Posting Requirement:* Compliance usually requires, among other things, that the respondent employer post and maintain for 60 consecutive days from the date of posting a notice to its employees; and that a respondent union post and maintain for 60 consecutive days from the date of posting a notice to members or to employees. With respect to posted side notices see section 10526.6.

10526.2 *Wording Fixed:* The wording on the notice will be fixed by the order with which compliance is being sought, and no variation or substitution should be permitted. If (or because of a change of circumstances) a party believes that the contents of the notice or the method of publication is defective, it should address its complaint to the Board (see sec. 10444).

10526.3 *Location and Number of Copies:* The general locations of the posting (plant, office, meeting hall, etc.) will normally be fixed. Within these general descriptions, the regional representative must determine the propriety of specific location or locations. Notices must be placed in conspicuous places where they can be read. Examples are bulletin boards where notices are customarily posted, timeclocks, department entrances, meeting hall entrances, or dues-payment windows.

The number of copies to be posted varies with circumstances. Enough copies should be posted to constitute full publication.

10526.4 *Preparation of Notice for Posting:* Copies should be provided by the Regional Offices. They should appear on the Board's notice forms and should be legible. Posted notices should be signed by a responsible official of the respondent and should bear the date of original posting. (With respect to subsequent checking of posted no-

[1] *Mead Corp.*, 256 NLRB 686 (1981).

tices, see Policing and Routine Notice Checks, secs. 10504.6 and 10526.6.)

10526.5 *Posting by Union:* When copies of notices by a union are to be posted at the premises of an employer as well as at union premises, such copies should be prepared by the Regional Office, sent to the union for signatures *and return*, and then transmitted to the employer for posting.

10526.6 *Routine Notice Checks:* One or two routine checks of posted notices should be made by regional personnel who, in the course of other business, are in the neighborhood of the posted notices during the posting period. If it appears that the posting is inadequate, either because of location of notices, seasonality of operations, etc., or if side notices are present, appropriate corrections should be recommended.

10526.7 *Certificate of Posting:* Respondent should be told that, on posting of a notice, it should submit two signed and dated copies to the Regional Office, along with a certification of posting, and also that, in addition to this initial report (see sec. 10504.5), it should report at the end of the posting period that the copies were continuously and conspicuously posted.

10528 *Reinstatement*

10528.1 *Generally:* The normal reinstatement order calls for "immediate and full reinstatement to [the discriminatee's] former position or, if that position no longer exists, to a substantially equivalent one,[1] without prejudice to seniority[2] or other rights or privileges . . . ."[3] When action by a union is involved, normally the order calls for the union's notification to the employer and the discriminatee, in writing, that it has no objection to the reinstatement of the discriminatee to that individual's former or substantially equivalent position, without regard to membership or nonmembership in any labor organization, and without prejudice to seniority or other rights or privileges. The notification also contains a request that the employer offer reinstatement.[4] If neither the former position nor a substantially equivalent one exists, the employer may be required to take appropriate alternative

[1] E.g., *Owens-Corning Fiberglas Corp.*, 155 NLRB 75, 77 (1955); *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605, 606–607, 611–612 (1964).
[2] E.g., *Lykes Bros.*, 128 NLRB 606, 609 (1960).
[3] E.g., *Lykes Bros.*, supra; *M. J. McCarthy Motor Sales*, supra.
[4] E.g., *Machinists District Lodge 94 (Consolidated Rock)*, 126 NLRB 1265, 1268–1269 (1960).

remedial action, such as hiring discriminatees in other parts of its business or placing them on a preferential hiring list.

When the employee is in the Armed Forces of the United States at the time the required offer is made, the Board requires that the employer's offer also notify the employee of the right to accept reinstatement following discharge from the Armed Forces (see sec. 10528.11). When the Board finds that a strike is an unfair labor practice strike, it requires as a remedy that the employer offer the striking employees reinstatement on their application and, as to employees precluded from applying because serving in the Armed Forces, notify them of their right to reinstatement after release from service.[5]

10528.2 *To "Former Position":* Reinstatement to a "former position . . . without prejudice [etc.]" means reinstatement to the job the discriminatee would have had absent the discrimination.[6] Where pay raises or other emoluments for a particular job would have been granted or established, proper reinstatement requires that such increased pay rates or emoluments be offered the discriminatee.[7] When the employee would normally (i.e., without discrimination) have been promoted or transferred during that period of nonemployment, the restored position should be that to which the discriminatee should have been promoted or transferred. In such a case the wages (whether higher or lower) and other emoluments of the position offered should be those of the position to which the discriminatee would have been promoted or transferred.[8]

Whether, and what, changes would have taken place (absent the discrimination) must be determined by an investigation of the circumstances surrounding the job. In this respect, the normal practices of the employer and the experience of other employees in similar jobs are highly significant,[9] although reinstatement must nonetheless be offered, even though insufficient jobs are available on the date of the offer, by placing the discriminatee on a preferential hiring list (by which is meant that the individual will be hired before any new employees are hired for that job in the future or a substantially equivalent one).[10]

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[5] National Labor Relations Board, Rules and Regulations, Series 8, as amended, Sec. 203.130.

[6] E.g., *Chase National Bank*, 65 NLRB 827, 829 (1946); *NLRB v. Draper Corp.*, 159 F.2d 294, 297 (1st Cir. 1947).

[7] E.g., *Ripley Mfg Co.*, 144 NLRB 1132, 1147 (1963).

[8] E.g., *Maurice Antrobi*, 164 NLRB 1102, 1103 (1967).

[9] See *East Texas Steel Castings Co.*, 116 NLRB 1336, 1337–1338, 1353–1354 (1956), enfd. 255 F.2d 284 (5th Cir. 1958), although the issue here was not reinstatement but the validity of the gross backpay computation.

[10] E.g., *Venezia Bread Co.*, 147 NLRB 1048, 1048–1049 (1964).

If, however, the incumbent of a job considered to be the discriminatee's former job is an individual who would be in that job now even if there had been no discrimination, that person need not be displaced. For example, if there were five jobs identical to the discriminatee's at the time of the discriminatory discharge; if, for economic reasons, there are only three such jobs at present; and if, based on an examination of all the circumstances, it appears that the discriminatee absent discrimination would not have been retained in any of the remaining three positions; then reinstatement need not be offered to this position. Furthermore, although a discriminatee need not be offered reinstatement to a position that no longer exists, the respondent is required to reinstate such person to a substantially equivalent one (see sec. 10528.3) or in certain circumstances to one which that individual is qualified to perform.[11]

An employer may contend that a discriminatee is no longer suitable for a job due to ill health, lack of skill, or experience, because of new machinery installations, abolition or change of job content, automation, etc. As a consequence the employer may urge that backpay be tolled as of the time of the change on the basis that the discriminatee would have been discharged then and that it not be required to reinstate the discriminatee.

In view of the plain language of the order, the burden of proof is unquestionably the respondent's and cannot be satisfied with speculation or statements that are not factually supported.[12] The controlling rule is that a discriminatee is entitled to a trial period at a job in which changes have been made during the period of discrimination as a result of which the individual *may* not be able to perform satisfactorily.[13] If the trial period ends unsatisfactorily for the discriminatee, and a complaint is made that the discriminatee was not given a fair trial, a further investigation is usually made of the respondent's employment records and/or personnel files to determine the employment experience of employees situated similarly to the discriminatee, including the work experience and training of present employees. Incumbent employees may be interviewed to ascertain their skills and the training required and received.

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[11] E.g., *Nibco, Inc.*, 119 NLRB 277, 278 (1957).

[12] E.g., *Ellis & Watts Products*, 143 NLRB 1269, 1271 (1963), enfd. 344 F.2d 67, 69 (6th Cir. 1965).

[13] E.g., *Lipman Bros.*, 147 NLRB 1342, 1349 (1964), enfd. 355 F.2d 15 (1st Cir. 1966); *Oil Workers (Kansas Refined) v. NLRB*, 547 F.2d 575 (D.C. Cir. 1976).

When the compliance officer feels it will be of assistance, the compliance officer should consult with trade school specialists, union officials with long experience in the industry, the Apprenticeship Bureau of the Department of Labor, the state unemployment commission or industrial commission, or similar authorities in the field. Careful investigation by the compliance officer may disclose that the relevant evidence refutes the contentions and that the discriminatee should be afforded further training or transfer to an available job for which the discriminatee is qualified, as may be necessary.

10528.3 *To "Substantially Equivalent" Position:* If reinstatement to a discriminatee's former position cannot be offered, either because the job has been eliminated or because, even had the discrimination not occurred, the discriminatee would not have been the present incumbent of the position, employment in a "substantially equivalent" position should be offered.[14]

10528.4 *Preferential Hiring List:* When a discriminatee has been ordered reinstated, should reinstatement not be available to either the former position or a substantially equivalent one, that individual should be accorded such treatment as is warranted under the employer's (nondiscriminatory) practices. If the discriminatee, absent the discrimination, would now have been on a layoff or preferential hiring list, said individual should be placed on such list in compliance with the order. If the discriminatee would have been recalled absent discrimination, said individual should now be recalled.[15] If the order specifically provides the employee be placed on a preferential hiring list, the order must be complied with.[16]

The Region must follow up from time to time on the adherence to and use of the preferential list.

10528.5 *Insufficient Reinstatement Positions:* If there are many discriminatees and there are insufficient reinstatement positions for all, the above principles (determining "what would have happened absent discrimination") must be used to determine which of the discriminatees

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[14] E.g., *Chase National Bank*, 65 NLRB 827, 829 (1946); *NLRB v. Draper Corp.*, 159 F.2d 294, 297 (1st Cir. 1947).

[15] E.g., *Mount Hope Finishing Co.*, 106 NLRB 480, 499 (1953), enf. denied on other grounds 211 F.2d 365 (4th Cir. 1954).

[16] E.g., *Venezia Bread Co.*, 147 NLRB 1048, 1048–1049 (1964). See also *Royal Typewriter Co.*, 209 NLRB 1006, 1015 (1974), enfd. 533 F.2d 1030 (8th Cir. 1976), for requirement to afford discriminatees preferential hiring rights at plants of multiplant employer.

should be presently reinstated and what arrangements to make for the rest.[17] (See sec. 10555 for sample computations.)

10528.6 *Temporary Withdrawal From Labor Market No Bar to Reinstatement:* A temporary withdrawal from the labor market (e.g., return to school or a long absence for illness, injury, pregnancy, etc.), although it may affect a discriminatee's backpay (secs. 10612–10618), does not normally terminate the employer's obligation to reinstate.[18]

10528.7 *Advance Waivers and Rejections: Claims of Unsuitability and Settlements in Lieu of Reinstatement:* An employer's obligation to reinstate, as a result of an order, continues (as long as it remains in business) until, by operation of one of the principles discussed above, the obligation is discharged.

Statements made by a discriminatee prior to the time a good-faith offer of reinstatement is made, which purport to waive the right to reinstatement, should be discounted and may not in themselves operate to toll backpay or serve to relieve the employer of the obligation under the order to offer reinstatement.[19] See section 10740.6.

An offer of reinstatement must be made even when reinstatement is sought to be avoided because it would allegedly cause "disruption of operations" or "adversely affect morale."[20] Such claims should be carefully evaluated. An employer may not escape the requirement by substitute inducements made to the discriminatee directly or through the compliance officer. In the rare case when convincing evidence of unsuitability for employment is proffered, settlements in lieu of reinstatement are not acceptable, unless the Regional Director (after clearance through the Division of Operations Management) agrees that under the particular circumstances such a settlement effectuates the policies of the Act.

10528.8 *Period for Acceptance of Offer; Sick and Striking Employees:* The offer should give the discriminatee a reasonable period for acceptance and reporting depending on both the employer's and the discriminatee's circumstances. (See sec. 10528.14 below.) Although a

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[17] E.g., *Mount Hope Finishing Co.*, 106 NLRB 480, 499 (1953).

[18] See *Deena Artware, Inc.*, 112 NLRB 371, 376 (1955), enfd. 228 F.2d 871 (6th Cir. 1955).

[19] E.g., *Heinrich Motors*, 166 NLRB 783, 785 (1967), enfd. 403 F.2d 145, 149 (2d Cir. 1968): "[s]uch a statement prior to Respondent's offer could not manifest 'an equivocal resolve not to accept reinstatement.'" *Arista Service*, 127 NLRB 499, 500 (1960); *Lyman Steel Co.*, 246 NLRB 712 (1979).

[20] E.g., *Fry Products*, 110 NLRB 1000, 1001 (1954).

discriminatee may not require the employer to hold an offer of reinstatement open indefinitely merely to suit the discriminatee's convenience,[21] there may be circumstances that will tend to lengthen the required period; for example, if the discriminatee is unable to report because of illness, the period for reporting should be kept open as long as is consistent with the employer's usual (nondiscriminatory) practice with respect to holding jobs open for sick employees. The inability of a discriminatee to accept an offer of reinstatement because of illness does not relieve the employer of its obligation to reinstate the discriminatee.[22] The discriminatee cannot be offered reinstatement only to a job for which that person is physically unqualified if it is not the job that was held before the discrimination.[23] Although a striker is not required to abandon a strike in response to an offer of reinstatement, the striker, if not discharged for engaging in the strike, does not become entitled to backpay until after the striker offers to return unconditionally. When, however, the striker is discharged for engaging in the strike, backpay accrues from the date of the discharge, until the date the employer offers unconditional reinstatement.[24]

10528.9 *Rejection of Offer for Alleged Cause:* Where an offer of full reinstatement has been made but the offer is rejected on the ground that backpay was not also tendered, the discriminatee may lose reinstatement rights[25] (and backpay will be tolled—see sec. 10612). The discriminatee should be advised to accept the offer, leaving the question of backpay for separate disposition.[26]

An employer's valid offer of reinstatement to some but less than all of a group of unfair labor practice strikers will toll backpay regarding those to whom the offer is made although they do not lose their rights to reinstatement if they refuse the offer because it was not made to the entire group.[27] An offer that is conditioned on the discriminatees' withdrawal of Board proceedings[28] or waiver of backpay is not, however, a valid offer. A discriminatee may refuse an inadequate offer of

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[21] E.g., *Tennessee-Carolina Transportation*, 108 NLRB 1369, 1371 (1954), remanded on other grounds 226 F.2d 743 (6th Cir. 1955).

[22] E.g., *NLRB v. Mooney Aircraft*, 61 LRRM 2164, 2165–2166 (5th Cir. 1966), contempt proceeding on order in 138 NLRB 1331, 1333 (1962), enfd. 328 F.2d 426 (5th Cir. 1964).

[23] E.g., *Lipman Bros.*, 147 NLRB 1342, 1347 (1964), enfd. 355 F.2d 15 (1st Cir. 1966).

[24] E.g., *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 416 (4th Cir. 1968), enfg. in relevant part 164 NLRB 1127, 1156 (1967); *Abilities & Good Will*, 241 NLRB 27 (1979).

[25] E.g., *G. W. Emerson Lumber Co.*, 101 NLRB 1046, 1047 (1952).

[26] E.g., *National Screen Products Co.*, 147 NLRB 746, 747–748 (1964).

[27] E.g., *Southwestern Pipe*, 179 NLRB 364, 364–365 (1969), modified on other grounds 444 F.2d 340 (5th Cir. 1971).

[28] See *Mundet Cork Corp.*, 96 NLRB 1142, 1151, and fn. 19 (1951).

reinstatement without waiving the right to reinstatement[29] (although backpay may be affected—see sec. 10612) and the discriminatee should be so informed. When the adequacy of an offer of reinstatement is a borderline question, the discriminatee should be advised that a refusal may imperil the right to reinstatement and that it would be advantageous to accept the offer pending disposition of the problem.[30]

10528.10 *Adequacy of Offer: Company Policy:* When the adequacy of an offer may hinge on the existence of company policy concerning seniority, promotion, transfer, layoff, etc., the employer should be required to furnish copies of the pertinent documents, or a written statement attesting to such policy. If it is set forth in a collective-bargaining agreement, a copy of the agreement should be secured.

10528.11 *Discriminatee in Armed Forces:* When an employee who is required to be reinstated is in the Armed Forces at the time the order issued, the employer's offer of reinstatement should be in the form of a letter (copy to Regional Office) conforming in content with Pattern 9.[31]

Pattern 9 letter to discriminatee in armed service:

> Pursuant to an order of the National Labor Relations Board and judgment of the United States Circuit Court of Appeals, you are hereby offered full reinstatement to your former or substantially equivalent position without prejudice to your seniority or other rights and privileges.
>
> Since you are in the Armed Forces of the United States, this offer will take effect upon your notifying us of your desire for reinstatement within 90 days after your discharge from the service, or from hospitalization continuing after discharge for a period of not more than 1 year. This is intended to give you the protection contemplated by the Universal Military Training and Service Act, as amended, or of any future amendments thereto.

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[29] E.g., *Harry Miller Beer Distributing*, 157 NLRB 1262, 1263 (1966).

[30] See *Differential Steel Car Co.*, 75 NLRB 714 (1948), enfd. 179 F.2d 241 (6th Cir. 1949). See also *Oil Workers (Kansas Refined) v. NLRB*, 92 LRRM 3185, 3188–3190 (D.C. Cir. 1976), reversing 215 NLRB 443 (1974).

[31] E.g., *Hunt Heater Corp.*, 108 NLRB 1353 (1954), enfd. 35 LRRM 2557 (6th Cir. 1955); *Stationers Corp.*, 96 NLRB 196, 201 (1951).

The discriminatee must be informed of the order as it applies to him or her and must be instructed to notify the Region as to his or her whereabouts. After discharge from the service or from hospitalization, and on timely notification thereof to the employer, the discriminatee's right to reinstatement will be governed by the general principles set forth in this section.

10528.12 *Reinstatement Rights of Strikers:* Unfair labor practice strikers are entitled to full reinstatement on unconditional application.[32] If necessary to bring about full reinstatement of the strikers, the employer must dismiss any persons hired during an unfair labor practice strike.[33] When a continuing unfair labor practice strike may still be in effect at an employer's plant at the time the Board issues an order against it, the Board will specifically order the respondent to reinstate the strikers on application and to make them whole for any loss of pay resulting from the failure to reinstate them within 5 days after their application.[34]

Economic strikers are entitled to full reinstatement on unconditional application if their jobs are available or, if such are not available, reinstatement to substantially equivalent positions.[35] If, at the time of the strikers' application for reinstatement, their jobs are occupied by permanent replacements, the employer need not discharge the replacements to make room for the strikers.[36] However, if vacancies later arise, the employer must seek out the strikers in accordance with the principles set forth in section 10528.4 and offer them such reinstatement, unless they have obtained regular and substantially equivalent employment elsewhere, or unless the employer can show legitimate and substantial business justification for failing to offer such reinstatement.[37]

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[32] E.g., *Mastro Plastics Corp. v. NLRB*, 250 U.S. 270, 278, and fn. 9 (1956), affg. 214 F.2d 462, 466 (2d Cir. 1954), enfg. 103 NLRB 511, 519–520, 562 (1953).

[33] E.g., *Mastro Plastics Corp.*, 103 NLRB 511, 562; *NLRB v. Auto Workers Local 833 (Kohler Co.)*, 351 F.2d 798, 804–807 (D.C. Cir. 1965); *NLRB v. Giannasca*, 119 F.2d 756, 758 (2d Cir. 1941), enfg. 23 NLRB 541, 547 (1940).

[34] E.g., *Denver Automobile Dealers Assn.*, 10 NLRB 1173, 1219, 1222 (1939). However if the employer "rejects, unduly delays, or ignores any unconditional application to return to work or attaches unlawful conditions to its offer of reinstatement . . . backpay will commence as of the date of the unconditional application to return to work." *Drug Package Co.*, 241 NLRB 330, 332 fn. 13 (1979).

[35] E.g., *Laidlaw Corp.*, 171 NLRB 1366, 1367–1370 (1968), enfd. 414 F.2d 99, 103–106 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969); *Brown & Root, Inc.*, 99 NLRB 1031, 1046 (1952), modified on other grounds 203 F.2d 139, 147 (8th Cir. 1953); *Brown & Root, Inc.*, 206 F.2d 73 (8th Cir. 1953), petition for rehearing denied; *MCC Pacific Valves*, 244 NLRB 931 (1979), remanded 665 F.2d 1053 (9th Cir. 1981).

[36] E.g., *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938) (dictum; the Court actually decided (at 346–347) that Sec. 8 of the Act prohibits an employer from discriminating on the basis of union activities in its reemployment of economic strikers).

[37] E.g., *Laidlaw Corp.*, supra; *American Machinery Corp.*, 174 NLRB 130, 133–134 (1969), enfd. 424 F.2d 1321, 1324–1328 (5th Cir. 1970).

The requirement of unconditional application can be satisfied by an application by the union, acting as the strikers' agent, on behalf of all strikers; individual applications by the strikers are not necessary.[38] Similarly, an employer's offer of reinstatement to the strikers as a group may be adequate if made to the union representing the strikers.[39]

10528.13 *Strikers' Reinstatement Required Within 5 Days of Application:* When the right of reinstatement is conditioned on application, as in the case of strikers, unless otherwise provided in the Board's order, the respondent must reinstate the employee within 5 days after the unconditional request for reinstatement is made or make the employee whole for any loss caused by its failure to do so,[40] unless work is unavailable in which case different rules apply.[41]

10528.14 *Deadlines for Acceptance:* The Region must not agree to hard-and-fast deadlines for the acceptance of offers of reinstatement or permit the respondents to couple hard-and-fast deadlines for acceptance with offers of reinstatement. Each case must depend on its own circumstances. Many discriminatees, during periods of discrimination, obligate themselves to activities that cannot be terminated immediately upon receipt of an offer of reinstatement, and they must be given adequate time to disengage themselves before being required to accept or abandon their rights to reinstatement.[42]

10528.15 *Offer and Response in Writing:* To avoid misunderstanding, the compliance officer should advise employers to make offers of reinstatement in writing and should likewise advise discriminatees to respond thereto in writing. Employers should be advised that they are not to rely on communications of a reinstatement offer to regional personnel (e.g., the compliance officer or other Board agent) as constituting communication of the offer to the discriminatee. See also section 10532.8.

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[38] E.g., *Shop Rite Foods*, 171 NLRB 1498, 1510–1511 (1968), modified on other grounds 430 F.2d 786 (5th Cir. 1970); *Ekco Products Co.*, 117 NLRB 137, 147–148 (1957).

[39] E.g., *Art Metalcraft Plating Co.*, 133 NLRB 706, 707 (1961), enfd. 303 F.2d 478 (3d Cir. 1962).

[40] E.g., *Trinity Valley Iron Co.*, 127 NLRB 417, 419 (1960), enfd. 290 F.2d 47, 48 (5th Cir. 1961). And see the compliance phase of this case where the validity of the 5-day rule was litigated. *Trinity Valley Iron Co.*, 158 NLRB 890, 892–894 (1966), enfd. in relevant part 410 F.2d 1161, 1171–1172 (5th Cir. 1969).

[41] See, e.g., *Walsh Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 296–297 (1960) (unfair labor practice strikers); *Robinson Freight Lines*, 129 NLRB 1040, 1040–1041 (1960), enfd. 289 F.2d 937 (6th Cir. 1961) (economic strikers).

[42] E.g., *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1706–1707 fn. 4 (1965), enfd. in relevant part 360 F.2d 569, 574 (5th Cir. 1966).

10528.16 *Liability of Successor Employers:* Successors who purchase with knowledge of the pendency of charges against their predecessor must comply with reinstatement and backpay orders directed to such predecessors.[43]

The responsibility of establishing that a successor employer was without knowledge of the predecessor's unfair labor practices at the time it took over the predecessor's operations rests with the successor.[44] Successors to bankrupt employers are responsible for remedying the unfair labor practices of the predecessor.[45] Although bankruptcy courts may have the authority to assign a certain priority to the Board's claim for backpay, the authority to modify or set aside the Board's order rests exclusively with the Board and the appropriate reviewing Federal courts and not the bankruptcy courts.[46] Questions regarding a bankrupt respondent's ability to comply with a Board order are dealt with in the compliance stage.[47] (But see sec. 10505 regarding the actions to be taken involving potential issues of derivative liability.)

10528.17 *Unresolved Reinstatement Issues; Potential Contempt Issues:* Following court judgment, when a controversy exists concerning a reinstatement issue that cannot be resolved expeditiously, the Region should submit the matter to the Contempt Litigation Branch with a recommendation whether contempt or administrative backpay proceedings are appropriate to secure compliance with the reinstatement order (see secs. 10509.7 and 10628.2). The Region should not proceed administratively to issue a backpay specification on reinstatement issues until so authorized by the Contempt Litigation Branch.

10529 *Regional Analysis of Compliance with Affirmative Provisions; Potential Contempt Issues:* Whenever a controversy arises concerning whether or not the respondent is complying with an affirmative provision of the Board's order, as enforced, the Region, absent immediate resolution of the matter, should consider whether the respondent's failure to comply may constitute contumacious conduct. For example, when the respondent's defense to noncompliance is specious or when dilatory compliance is not based on a legitimate factual or legal dispute,

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[43] E.g., *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), *passim*, affg. 467 F.2d 164 (9th Cir. 1972), enfg. 187 NLRB 1017 (1971). See also *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. sub nom. *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

[44] *AM-DEL-CO, Inc.*, 234 NLRB 1040 (1978).

[45] *International Technical Products Corp.*, 245 NLRB 1301 (1980).

[46] *International Technical Products Corp.*, supra; *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261 (1940).

[47] *Jackson Hilton*, 216 NLRB 541 (1975).

the Region should consider submitting the matter to Contempt as an alternative to protracted discussion with the respondent, which may or may not ultimately result in compliance. In those situations in which a new charge is filed, see sections 10509.2 and 10509.3.

BACKPAY IN GENERAL

10530–10546 *Backpay*

10530–10533 *In General*

10530 *"Making Whole"; Generally:* "Making whole for loss of earnings suffered by reason of the discrimination" is a common remedy in 8(a)(3) and 8(b)(2) cases and may be ordered when violations of Section 8(a)(1), (4), and (5) are found also. This obligation, whether imposed on an employer, a union, or both, is designed to correct a situation brought about by unfair labor practices. "Making whole" involves payment to the discriminatee of a sum equal to gross backpay (what the discriminatee would have earned in employment lost through discrimination) less net interim earnings (what was actually earned from other employment during the period less expenses incurred in seeking and holding interim employment), the difference between the two being the net backpay due.

Court judgment cases involving a refusal to pay backpay when no legitimate "controversy" can be raised by the respondent on backpay amounts and involving reinstatement issues should be submitted to the Contempt Litigation Branch before proceeding administratively. (See secs. 10509.6, 10528.17, 10529, and 10628.2.)

10530.1 *Definitions of Backpay Terms:*

a. *Period Covered:* The period covered is that from the discriminatory loss or refusal of employment to the date a bona fide offer of reinstatement is to be effective, but it does not include any period (1) during which there was no obligation to reinstate (see Reinstatement, sec. 10528); (2) during which the respondent proves the discriminatee was not available for work or has incurred a willful loss of earnings (see secs. 10612–10620); or (3) if so specified in a Board order.

b. *Backpay Period:* The period of time during which backpay accrues, usually between the date of discrimination and the date a bona fide offer of reinstatement is to be effective.

A number of circumstances may occur that create exceptions to this rule. For instance, when a respondent unjustifiably delays putting a discriminatee back to work after acceptance of the re-

spondent's offer of reinstatement, backpay continues to accrue until the discriminatee is actually put back to work.

c. *Gross Backpay:* The amount of money the discriminatee would have earned from employment by the employer involved had the discrimination not occurred. This includes bonuses, vacation pay, and other elements of reimbursement to employees that were paid by the employer. However, the values of company housing, health and life insurance benefits, and other similar "fringe" benefits are *not* "gross" backpay in the sense that they are *not* subject to reduction by interim earnings. If the discriminatees would have normally received such benefits at the gross company absent discrimination, the respondent is required to reimburse them to the same extent subject to reduction only by similar "fringe" benefits received in interim employment.

d. *Gross Employer or Company:* The employer or company at whose plant the discrimination took place—not necessarily a respondent.

e. *Interim Earnings:* Amounts of money the discriminatee earned during the backpay period in interim employment. Included are net earnings in self-employment and the value of perquisites of interim employment such as board and room. Under some circumstances the amounts that would have been earned had the discriminatee not quit, been discharged, or refused interim employment are deducted from gross backpay.[1]

f. *Expenses:* Necessary expenses incurred by the discriminatee in seeking and holding interim employment.

g. *Net Backpay:* The amounts owing each discriminatee by the respondent; i.e., the sum of gross backpay minus interim earnings reduced by expenses for each calendar quarter of the backpay period. Added to this are "fringe" benefits discriminatees would have received less those received in interim employment.

h. *Quarterly Computation:* In the usual case, computation should be on a quarterly basis corresponding to the four quarters of the calendar

[1] E.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-198 (1941), affg. 113 F.2d 202, 206 (2d Cir. 1940); *Mastro Plastics Corp.*, 136 NLRB 1342, 1352 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1965); *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1703-1704 (1965), enfd. in relevant part 360 F.2d 569, 575 (5th Cir. 1966); *Midwest Hanger Co.*, 221 NLRB 911 (1975) (claimant Margaret Buckley).

year; net backpay due should be computed for each such quarter, and the sum found applicable for each quarter should neither affect nor be affected by experience in other quarters. (See *Woolworth* Formula, sec. 10534.1.)

When the employment relationship has not been severed, as, for example, where the discriminatee continues to work throughout the period for the respondent or gross employer but at discriminatorily lower rates or other conditions that adversely affect earnings, then the rationale for the quarterly computation is not applicable and the backpay may be computed on a total period basis as before *Woolworth*, unless there are other circumstances that favor the quarterly method.[2]

10532 *Computation of Backpay: in General*

10532.1 *Compliance Officer Responsibility:* The compliance officer is responsible for computing gross and net backpay in all cases. The compliance officer should not depend wholly on the respondents for this, but should at all times retain the initiative for action. To rely on the respondents without periodically actually verifying the status and progress of the computation almost always implies loss of control over the time when actions must take place and results in delays in case processing. However, if the respondents are willing to compute backpay within our operational schedules, the Regions may accept their assistance, but specific time schedules for producing the computations must be set, agreed to, and performed. It has been found advisable, to ensure accuracy of computations prepared by the respondents, to request that the respondents' accountant or head bookkeeper sit in on discussions leading to computations of backpay to become familiar with the Board's requirements in this area, as, for example, the computation of backpay on a quarterly basis.

10532.2 *Time When Backpay Computation Starts:*

a *Before Court Judgment:* Attempts to settle or secure compliance in backpay cases should be made before hearing, and following issuance of administrative law judges' decisions and Board orders (sec. 10502). As soon as the respondents indicate their willingness to settle or comply in any case in which the Board's "make whole" remedy is appropriate or has been ordered, or the backpay period

[2] E.g., *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971); *Paramount Plastic Fabricators*, 190 NLRB 170 (1971).

is terminated, backpay computations should begin. Time should not be lost awaiting offers of reinstatement as long as it is known that such offers will be made. Much progress can be made before this occurs.

b. *After Court Judgment:* Backpay computation procedures should begin or resume on issuance of a court opinion fully enforcing a "make whole" order. If the court only partially enforces, see section 10502.5. If the respondent indicates it will not offer reinstatement because it intends to appeal to the Supreme Court, backpay computation procedures normally should start immediately. If there is a stay of mandate by the court, computation should begin:

1. Immediately after certiorari is denied

2. Immediately following the expiration of the 90-day period after circuit court judgment if in fact a petition for writ of certiorari has not been filed

3. Immediately after issuance of Supreme Court decision. (See secs. 10502.5 and 10502.6.)

10532.3 *Preparing the Backpay Computation:* Procedures for computing backpay are directed at obtaining compliance with the greatest speed consistent with effectuation of the purposes of the Act. Insofar as the backpay remedy is concerned, these purposes are:

a. Discouraging the respondents from further unfair labor practices.

b. Assuring discriminatees their Section 7 rights are being given Government protection.

Following are steps to follow in preparing the backpay computation, bearing in mind that in the interest of expedition several may be in process simultaneously:

a. Initiate negotiations for compliance.

b. Request access to relevant records.

c. Forward Form NLRB-4180 to the SSA.

d. Review case background material.

e. Check offers of reinstatement for good faith; establish starting and ending dates for backpay period.

f. Obtain copies of relevant records.

g. Examine and analyze records, decide which gross backpay formula is appropriate. Form NLRB-4312 is often helpful.

h. Analyze and summarize social security reports of discriminatees' earnings.

i. In some cases (see sec. 10568), prepare estimate of net backpay if in the Region's opinion this will lead to settlement of backpay issues without a backpay proceeding.

j. If estimate is made, *continue with preparation of backpay computation.*

k. Obtain additional needed interim earnings and search for work data.

l. Prepare computation of net backpay.

m. Send net backpay computation with letter requesting payment to the respondent.

n. Prepare and serve backpay specification.

10532.4 *Obtaining Relevant Records.* In all cases but those settled within a relatively short time after the unfair labor practice, the employer's records are the principal source of information on which an accurate gross backpay computation can be based. In some industries, union hiring hall, dispatch and pension, and vacation and welfare plan records may be an additional source of data. Requesting and obtaining access to these is therefore of first priority. It is preferable practice to telephone the gross employer as soon as a case reaches the compliance stage and arrange to visit its office to examine and select the appropriate records. If practicable and possible and in the interests of saving added expense, records should be analyzed in the Regional Office.

10532.5 *Types of Relevant Records:*

a. *Individual Earnings Cards:* Every company that pays social security taxes must file quarterly returns with the Internal Revenue Service showing how much wages were paid, during the past calendar quarter, to each employee. In order to do this and to keep a cumulative total of each employee's earnings during the year so as to terminate tax payments when the annual wage limitation (as explicated in sec. 10649.1) is reached, employers keep a record card for each employee to which is posted, by pay periods, the rate of pay, the amount earned, the hours worked, the deductions made, etc. Often these cards show the employee's job and department. The sums are totaled for each quarter and for the year.

These cards are not uniformly known by the title above, and an explanation of the records desired may be needed. *In most cases the individual earnings card is the single most valuable source of backpay information.*

b. *Personnel Records:* Most employers keep a file containing personnel information relating to their employees, such as pay rate and assignment change slips, applications for employment, termination slips, etc. These are valuable in determining job classifications, transfers, and pay rates and for obtaining information that may be used to locate missing discriminatees.

c. *Payrolls:* Payrolls are usually kept on large ledger sheets and show pay and hour data for each employee during the pay period. These are most useful for preparing estimates of backpay inasmuch as they usually recapitulate, on the first or last page, the total number of employees and the total amount paid—a basis for computing the earnings of the average employee for the pay period. They also identify supervisory employees in most cases.

d. *Quarterly Social Security Tax Returns:* These amount to a payroll for a calendar quarter instead of a pay period. Care must be exercised in using these inasmuch as they may not include earnings beyond the annual wage limitation level. (See sec. 10649.1.)

e. *Social Security Administration Report on Earnings:* In situations when payroll records are otherwise unavailable, the Region may follow the procedure set forth in section 10590 (for obtaining

interim earnings information from the SSA) to obtain information concerning the pre-unfair-labor-practice earnings of discriminatees at the gross employer for a representative period of time prior to the discrimination.

f. *Union Records:* In some cases the union's dispatch records and those kept to record employer pension, health, insurance, vacation, and welfare plan contributions, which are related to employee earnings under the plan, will often furnish information that is otherwise unobtainable.

10532.6 *Record Analysis: Need for Supplementary Affidavits:* When payroll or other records are made available, the compliance officer should become familiar with the contents of all the records covering the period from 1 month or more prior to the unfair labor practice through the date when the backpay period ended.

In the course of this examination, it should be noted whether the records carry notations of the job classifications and departments of all employees. If they fail to show this, the information—covering all relevant employees—should be obtained in writing from the gross employer. Ordinarily, the appropriate gross backpay formula will suggest itself once a knowledge of what has taken place in the gross employer's plant during and before the backpay period has been obtained from the records.

10532.7 *Review and Analysis of Case Record and Background:* It is important that all information available bearing on the backpay computation for each discriminatee be extracted from basic documents such as affidavits (prior to hearing), correspondence, complaint, testimony, exhibits, and administrative law judge, Board, and court decisions and orders. Many valuable and established facts concerning the conduct of the company involved (i.e., departments, separate plants, the functioning of various parts of the plant, significant dates, pre-unfair-labor-practice job assignments of discriminatees, etc.) are disclosed by these sources. In settlement negotiations and during hearing, a knowledge of the case background and particularly such admissions as interested parties may have made at the unfair labor practice hearing are of vital importance to the compliance officer.

10532.8 *Verification of Reinstatement (or Offer) and its Validity:* Respondents are required by Board orders to notify the Regional Di-

rector, in writing, within 20 days from the date of the order, what steps they have taken to comply. The compliance officer should make every effort to see to it that this time schedule is followed. The compliance officer should request the respondent to make offers by registered mail and send the Region (a) copies of the letters sent and (b) photocopies of return receipts. When a respondent has notified the Region it has offered reinstatement to the discriminatees, this should be checked by talking or writing to the discriminatees to ascertain whether they have in fact been offered and/or reinstated to their former or substantially equivalent jobs at the proper rates of pay and are not being subjected to discrimination of any kind. Deficiencies in reinstatement that are disclosed should be investigated promptly. Terminal dates for backpay should not be accepted as final until the compliance officer is satisfied that good-faith offers of reinstatement have been made and actual bona fide reinstatement has taken place when desired by the discriminatees. When compliance officers believe full reinstatement has not been offered and are prepared to recommend further formal action (i.e., issuance of Board order, enforcement, etc.), backpay computation actions should be suspended until dependable backpay termination dates are established. Normally when the compliance officer is in touch with persons required to be reinstated, the officer will advise them to reply to reinstatement offers in writing.

10532.9 *Reinstatement on Application; Backpay for Delayed Compliance:* When the right of reinstatement is conditioned on application, unless otherwise provided in the Board's order, the respondent must make the employee whole for any loss of earnings caused by its failure to reinstate said employee within 5 days in accord with the principles set forth in section 10528.13.

10532.10 *Liability of Successors:* Successors who succeed with knowledge of the charges pending against their predecessors are liable to comply with the Board's backpay order under the principles and conditions set forth in section 10528.16.

10533 *Union Backpay Liability—General Principles*

10533.1 *Backpay Remedy in Refusal to Process Grievance Cases:* In circumstances in which the union has unlawfully failed to process a

grievance, the union may be liable for any wages lost by the employee as a result of the union's unlawful conduct.[1]

10533.2 *Backpay Remedy in which Union and Employer are Jointly Liable:* Generally, the union is jointly and severally liable with the employer for all backpay from the date of the discrimination until 5 days after the date the union notifies, in writing, the employer and each discriminatee that it no longer has any objection to the reinstatement of the discriminatee. Thereafter, the employer is solely liable for additional backpay.[2] However, in certain joint and several remedies, depending on the circumstances of the case and the employer's relative culpability as compared to the union's, the union may be found "Primarily liable" while the employer is "secondarily liable."[3]

10533.3 *Backpay Liability When Union is Solely Liable:* When the union is solely liable for backpay, the backpay shall not be tolled until the employee is either reinstated by the employer to his or her former or substantially equivalent position or until the employee obtains substantially equivalent employment elsewhere.[4]

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[1] *Retail Clerks Local 324 (Fed Mart Stores)*, 261 NLRB 1086 (1982) (employer would not process grievance, union to make whole until employee finds substantially equivalent employment); *Steelworkers Local 15167 (Memphis Folding Stairs)*, 255 NLRB 484 (1981) (make whole until grievance is fully processed, or until employee is reinstated or secures substantially equivalent employment, whichever occurs first); *Electrical Workers UE Local 1105 (Westinghouse Electric)*, 254 NLRB 1186 (1981) (backpay warranted even when grievance ultimately dismissed, delay in grievance processing caused by union's unlawful conduct may have contributed to dismissal and any doubt to be resolved against wrongdoers); *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979) (no indication grievance will be deemed as untimely; no backpay awarded at this time; however, the union must process grievance and pay attorney fees of counsel chosen by discriminatees); *Henry J. Kaiser Co.*, 259 NLRB 1 (1981) (no-showing employer would refuse to accept grievee, backpay until union processes and pursues grievance with due diligence, or until reinstatement or substantially equivalent employment, whichever occurs first).

[2] *C. B. Display Service*, 260 NLRB 1102 (1982); *Port Jefferson Nursing Home*, 251 NLRB 716 (1980).

[3] *Q.V.L. Construction*, 260 NLRB 1096 (1982) (joint and several liability where employer delegates hiring to union through exclusive hiring hall, but when employer has no knowledge of discriminatory operation of hall, union is primarily, and employer is secondarily, liable); *Frank Mascali Construction Co.*, 251 NLRB 219 (1980) (joint and several liability, with union primarily and employer secondarily liable); *Zoe Chemical Co.*, 160 NLRB 1001 (1966) (union primarily liable, employer secondarily liable, until 5 days after union removes objections to reemployment, thereafter employer solely liable); *Bulletin Co.*, 181 NLRB 647 (1970) (union liable, but if union cannot pay, employer is liable).

[4] *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1981) (union caused employer to discharge employee, no charge filed against employer); *Iron Workers Local 118 (Pittsburgh Des Moines Steel)*, 257 NLRB 564 (1981) (union refused to refer employee to employer); *Iron Workers Local 111 (Steel Builders)*, 274 NLRB 742 (1985) (threats to file internal charges against travelers, which caused travelers to quit or not accept employment from employer).

10534–10546 *Gross Backpay Formulas*

10534 *Selecting a Gross Backpay Formula:* In general terms the formula for computing backpay is spelled out in the usual Board order (i.e., net backpay equals the amount the discriminatee would have earned, absent discrimination, less amounts earned in interim employment reduced by extra expenses necessary to such employment). This section, however, will discuss specific formulas for computing gross backpay only.

An appropriate gross backpay formula is one that is simple to understand, easy to apply, and accurate. In deciding on a formula to adopt for a particular case, the compliance officer should consider one (or a combination) of three measures: established or average hours and/or earnings of the discriminatee prior to the discrimination; hours and/or earnings of comparable employee(s); or hours and/or earnings of replacement employee(s). The particular formula employed will vary with the facts of a particular case and the data available, and in some cases none of the formulas listed may be feasible so that some other way of computing backpay is devised. The compliance officer should, following an analysis of the relevant records and the individual case background, select from among the above-mentioned factors the one(s) most appropriate to the case, remembering that there are numerous formulas that have been approved by the Board and the courts over the years. The compliance officer must take into account, among others, such factors as seniority and qualification in promotion or layoffs.

Difficulty in adapting any particular formula is often encountered because of unavailable data. Although available records may show much about employment conditions during the backpay period, they may be in such a form or have such defects as to negate the use of an otherwise excellent formula. Hence, in the selection of a gross backpay formula, the compliance officer should ascertain, before commitment to a course of action that may be time consuming, that the formula can be worked out accurately on the basis of the data available in the records.

As is indicated above, the principal source of valid information concerning the operations of the company, changes in pay rates and personnel, transfers, changes in methods of payment, number of employees, etc., is the company's records. Properly analyzed within the framework of the specific case, they provide an excellent basis for an accurate

determination of how much money the discriminatee would have earned absent discrimination.

A comparison of the company's records before the unfair labor practices with those during the backpay period should disclose changes in pay and hours, periods of high and low employment and earnings, shutdowns, department changes, bonus payments, etc. All changes from the status at the time of the unfair labor practices are significant in selecting a gross backpay formula. On the basis of this analysis, and in terms of the background of the specific case, a formula should be selected on a tentative basis. The records should then be reviewed to make sure they contain sufficient data to enable the ready preparation of a computation in accordance with the formula selected. If the case is complex, it is advisable to test the formula in a sample computation. This will disclose deficiencies before too much time is invested in the computation. In cases involving many backpay claimants and long backpay periods, if the Regional Office has reason to believe that backpay issues can be resolved without a formal proceeding, an estimate of backpay may be prepared to serve as a basis for settlement (see sec. 10568). In simpler cases, when computations can be speedily prepared, estimates should be avoided.

10534.1 *"Woolworth" Formula:* The usual gross backpay computation, in cases in which the discriminatees' employment relationships with the respondent have been severed as a result of discrimination (see sec. 10530.1 for exception), should be performed in accordance with the *Woolworth* formula[1] (i.e., by calendar quarters of the year even in those cases in which, at the outset, it appears that the net backpay will not be different from where a whole-period computation is performed). Later developments and disclosures may change the factual basis of the computation and require redoing the entire computation if the quarterly computation method is not used at the outset.

10534.2 *Changes in Job, Wages, Hours, Fringes, or Conditions:* The overall objective in the selection and execution of a gross backpay formula is to restore the discriminatees, as accurately as possible, to the economic positions that they would have enjoyed, absent discrimination, during the entire backpay period. Thus, the computations should reflect the rise and fall of working time, changing rates of pay, job transfers and promotions, and perquisites of employment (i.e., fringe

[1] E.g., *F. W. Woolworth Co.*, 90 NLRB 289, 291–294 (1950), approved *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1952), passim.

benefits, etc.). On the other hand, the Board is not required to strive for an unattainable standard of precision in its computations of backpay, so a solution of the problem of amount may be made on any range of facts, circumstances, or reasonable inferences that afford a rational basis for a conclusion.[2]

10536 *Four Basic Gross Backpay Formulas:* Although differing in details, there essentially are four backpay formulas used by the Board and approved by the courts through the years. Each formula is described below with criteria for application to the different circumstances encountered in Board cases. The compliance officer should, following analysis of the company's records and the individual case background, select from among these the one most appropriate to the case.

There are many variations of the basic formulas provided below.[1] Each of these basic formulas must usually be adjusted in details to meet the requirements of specific cases. More than one formula may be applicable to a given case. In line with the statement in section 10534, it is recognized that in certain cases, the four basic formulas or derivatives therefrom may not be applicable. In such cases, whatever formula is devised must be defensible as reasonable and proper and be argued to the administrative law judge as the most accurate method available.[2]

10538 *Formula One: Use of Discriminatee's Average Earnings Prior to the Unfair Labor Practice*

10538.1 *Description of Formula:* The discriminatee's average earnings per usual pay period at the gross employer is computed on the basis of that person's earnings for some period of time prior to the unfair labor practice.[1] This average is then used as the basis of what would have been earned during the backpay period. Thus, if in the pre-unfair-labor-practice period those earnings averaged $X per a weekly payroll period and the backpay period lasted Y weeks, the gross back-

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[2] E.g., *Palmer v. Conn. Railway & Lighting Co.*, 311 U.S. 544, 561 (1941); *NLRB v. Kartark*, 227 F.2d 190, 192–193 (8th Cir. 1955), enfg. 111 NLRB 630 (1955).

[1] E.g., *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, 151 NLRB 972, 981–986 (1965); *NLRB v. Brown & Root*, 311 F.2d 447, 452–453 (8th Cir. 1963); *Buncher Co. v. NLRB*, 405 F.2d 787, 788–790 (3d Cir. 1969); *Operating Engineers Local 370 (Associated General Contractors)*, 224 NLRB 941 (1976).

[2] *American Mfg. Co. of Texas*, 167 NLRB 520 (1967).

[1] See, e.g., *Arduini Mfg. Corp.*, 162 NLRB 972, 976, 986 (1967); *Clinchfield Coal Corp.*, 51 NLRB 539, 541 (1943), modified on other grounds 145 F.2d 66 (4th Cir. 1944); *Harry G. Bock*, 3 NLRB 110, 117 (1937).

pay would be the product of $X and Y weeks. If the backpay period covered more than one calendar quarter, the computation would be made separately for each quarter and the discriminatee's gross backpay would be the product of $X and the number of weeks in each applicable calendar quarter.

Note that if the discriminatee had been receiving a fixed amount each payroll period prior to discrimination (e.g., a salary), then it would not be necessary to determine the average earnings prior to the unfair labor practice. The fixed amount for the last full payroll period prior to discrimination would be used as the basis for computing gross backpay.

In either case, adjustment may be necessary to account for increases or decreases in rate of pay, etc., and the elimination of atypical weeks from the base period.

10538.2 *Criteria for Adopting Formula*

a. Discriminatee was employed by gross company prior to unfair labor practice for a period long enough to attain a level of skill and earnings that would not significantly increase in the backpay period. (If the discriminatee was a relatively new employee, whose earnings were significantly below those of similar employees, and those low earnings could reasonably have been caused by inexperience, this formula would not be appropriate.)

b. Company records provide adequate data to enable (1) a judgment as to the appropriateness of particular periods; and (2) an accurate computation of average earnings in the pre-unfair-labor-practice period.

c. The business of the company is not seasonal. In seasonal industries, there are relatively wide fluctuations in employee earnings depending on the season of the year. Thus, if the unfair labor practice occurred in a season of low business activity, the average of employee earnings during such period would be inordinately low and result in failure to make the discriminatee whole.

d. The backpay period is relatively short. (The shorter the backpay period, the less likely that such changes would have occurred as would invalidate this formula. Change is the essential disqualifying factor for employment of this formula and if it is known that none

has taken place during a long backpay period, this formula may still be applicable.)

and

During such period, no significant changes were made in the nature of the discriminatee's job, hours of work, rates of pay, method of payment (i.e., piecework, incentive, etc.), or methods of production. (Any such changes could result in changing the earning ability of a discriminatee. Thus, the pre-unfair-labor-practice average earnings in such circumstances would result, if projected through the period of change, in an inaccurate computation.)

e. This formula is adaptable to all kinds of wage payment methods as long as they are maintained through the backpay period. Piecework and other incentive methods of payment, as well as time-based pay systems, are properly covered by this formula.

10538.3 *Other Factors*

a. Selection of the pre-unfair-labor-practice period must be made to include neither excessively high nor low earnings caused by special nonrecurring factors, and must be long enough to reflect the discriminatee's normal fluctuation of earnings.[1] Particular care must be observed to avoid using earnings for periods when the unfair labor practices or other distortive factors were adversely affecting the earning ability of the discriminatee. (See sec. 10562.)

b. Overtime and other normal earnings during the pre-unfair-labor-practices period are to be included in the computation of average earnings.[2]

c. Periods of extended absence from work by the discriminatee, during the pre-unfair labor practices period, are *not* to be included in the computation of average earnings.[3] Weeks of plant operations during which the discriminatee worked less than 24 hours are to be

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[1] *Pacific Greyhound Lines*, 2 NLRB 431 (1936), enfd. 91 F.2d 458 (9th Cir. 1937), affd. 303 U.S. 272 (1938).

[2] E.g., *American Broach Co.*, 45 NLRB 241, 282 (1942).

[3] *Adams Motors*, 96 NLRB 1198 (1951).

considered such periods of extended absence, hence must not be included in the average.[4]

Gross backpay computations are directed at establishing the amounts of money that would have been earned had the discriminatee been employed continuously during the backpay period. Periods of unavailability for work due to illness, etc., are independently deducted. To include periods of extended absence from work in the average earnings would be, in effect, to assume continued similar absences of the same kind through each week of the backpay period—an assumption that is often unsupportable—and to penalize the discriminatee doubly for the periods when the individual in fact was unable to work, first automatically in the depressed average earnings figure, and second by deducting the period of unavailability from the backpay period.

10538.4 *Sample Computation of Gross Backpay: Formula One:* A typical computation of gross backpay using this formula is shown below. (Backpay computations need not be carried out to the last cent but may be rounded to the nearest dollar.)

a. *Computation of Average Pre-Unfair-Labor-Practice Earnings:* In the instant case it is assumed the 4-week period between November 14, 19xx, and December 16, 19xx, was a period of normal production. The Thanksgiving week and the 2 weeks immediately preceding the unfair labor practice, which occurred on December 31, 19xx, included a time of holiday activity during which, the gross employer's records show, subnormal operating conditions existed in the plant. As a result, they are excluded from the computation. From the point of view of length, this 4-week period was appropriate here. Other periods of varying length may be appropriate to other circumstances. Particular periods, within a longer period, that are not normal should be excluded from a computation based on this formula.

[4] E.g., *International Trailer Co.*, 150 NLRB 1205, 1211 (1965); *Harvest Queen Mill Co.*, 90 NLRB 320, 344 (1950) (fourth column caption); *Herman Bros. Pet Supply*, 150 NLRB 1419, 1421 fn. 3 (1964).

Week Ending	Earnings
Nov. 18, 19xx	$ 43.95
Dec. 2, 19xx	52.10
Dec. 9, 19xx	48.05
Dec. 16, 19xx	45.52
Total	$189.62
No. of weeks	4

Average pre-unfair-labor-practice weekly earnings—$47.41

b. *Backpay Period:* January 1, 19yy–July 26, 19yy

c. *Excepted Periods:* (Discriminatee sick or otherwise unavailable for work): March 12–21, 19yy; June 13–19, 19yy.

d. *Gross Backpay Computation:*

Quarter I—No. weeks: 11-2/5

Weekly pay rate	$ 47.41
Gross backpay	540.00

Quarter II—No. weeks: 12

Weekly pay rate	$ 47.41
Gross backpay	569.00

Quarter III—No. weeks: 3-4/5

Weekly pay rate	$ 47.41
Gross backpay	180.00

10540 *Formula Two: Use of Discriminatee's Average Hours of Work Prior to the Unfair Labor Practice*

10540.1 *Description of Formula:* When the data show, for example, that wage rates at the gross employer changed during the backpay period, gross backpay can be computed by determining the discriminatee's average hours of work per usual pay period on the basis of the

hours worked by that person for an appropriate period of time prior to the unfair labor practice, selected in accordance with the principles set forth in Formula One. Gross backpay can then be computed by multiplying the average hours per week (if that was the usual pay period) by the hourly rate of pay and the number of weeks in the backpay period (paying due regard to calendar quarters), and adjusting the rate of pay for those changes in it that would have occurred during the backpay period in the absence of discrimination.

For convenience, overtime hours should be converted to their straight-time equivalent (i.e., 1 overtime hour equals 1-1/2 straight-time hours, except where overtime is paid at higher rates than time and a half).

10540.2 *Criteria for Adopting Formula:*

a. This formula is especially suitable for situations characterized by changing rates of pay during the backpay period.

b. The gross company records show hours worked prior to the unfair labor practice in sufficient detail.

c. The business of the gross company is not seasonal (see 10538.2).

d. Discriminatee was employed by the gross company for a period, prior to the unfair labor practice, sufficiently long to show a typical working pattern.

e. The backpay period is relatively short and no significant changes were made in hours of work.

10540.3 *Other Factors:*

a. Selection of the pre-unfair-labor-practice typical period must be made to reflect neither excessively high nor low hours of work caused by special factors and must be long enough to reflect the discriminatee's typical fluctuation in hours worked.

b. Overtime hours worked during the pre-unfair-labor-practice period must be included in the average. (Conversion of overtime to equivalent straight-time hours for ease and convenience in computation is recommended. See sec. 10540.1.)

c. The provisions of section 10538.3 are also applicable to Formula Two.

10540.4 *Sample Computation of Gross Backpay Formula Two:* A typical computation of gross backpay in accordance with this formula is provided below:

a. *Computation of Average Hours:*

(Unfair labor practice occurred on December 31, 19xx)

Week ending	Hours worked		Hours converted to straight time equivalent adjusted hours
	Straight time	Overtime	
Oct. 7, 19xx	40	4	46
Oct. 14, 19xx	40		40
Oct. 21, 19xx	36		36
Oct. 28, 19xx	32	6	41
Nov. 4, 19xx	40		40
Nov. 11, 19xx	38		38
Nov. 18, 19xx	40	8	52
Dec. 2, 19xx	36	8	48
Dec. 9, 19xx	40		40
Dec. 16, 19xx	40	4	46
Total Adjusted Hours Worked			427
No. Weeks			10
Average Adjusted Hours Worked			42.7

b. *Backpay Period:* January 1, 19yy - July 26, 19yy

c. *Excepted Periods:* March 12–21, 19yy; June 13–19, 19yy

d. *Rates of Pay:* As of January 1, 19yy - $1 per hour

As of February 20, 19yy - $1.10 per hour

As of May 28, 19yy - $1.20 per hour

e. *Gross Backpay Computation*

Quarter	Weeks	Hours	Pay rate	Gross backpay
19xx—I	7	299 (7x42.7)	$1.00	$299
19yy—I	4-2/5	188	1.00	207
Total for Quarter I				$506
19yy—II	8	342	1.10	376
19yy—II	4	171	1.20	205
Total for Quarter II				$581
19yy—III	3-4/5	162	1.20	194
Total for Quarter III				$194

10542 *Formula Three: Use of Average Earnings (or Hours) of a Representative Employee (or Employees) Who Worked in a Job Similar to the Discriminatee's Before the Unfair Labor Practice and During the Backpay Period*[1]

10542.1 *Description of Formula:* An employee is selected who did work before the unfair labor practice and during the backpay period that was similar to that done by the discriminatee concerning content, rate, and most conditions and earned approximately the same amount of money. Those earnings in each pay period of the backpay period are used as the measure of what the discriminatee would have earned. When there are several such employees, the average of their earnings per pay period as a representative group may be used as that measure.

In some situations (e.g., when all other factors are the same, but the discriminatee and the representative employee or employees received different rates of pay) the representative employee's hours per pay period, or group of employees' average hours per pay period, will be

[1] Some cases in which the Board has used the earnings of employees comparable to the discriminatee(s) are as follows: *Rice Lake Creamery Co.*, 151 NLRB 1113, 1118–1119 (1965), affd. regarding backpay formula 365 F.2d 888 (D.C. Cir. 1966); *International Trailer Co.*, 150 NLRB 1205, 1208–1210 (1965); *Brown & Root*, 132 NLRB 486, 488–489 (1961), enfd. concerning formula used 311 F.2d 447, 452–453 (8th Cir. 1963); *East Texas Steel Castings Co.*, 116 NLRB 1336, 1337–1338, 1353 (1956), enfd. 255 F.2d 284 (5th Cir. 1958); *West Texas Utilities Co.*, 109 NLRB 936 (1954).

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used to measure the hours, or average hours, that the discriminatee would have worked during the pay periods in the backpay period. Such hours, multiplied by the discriminatee's rate (adjusted for changes which would have been made in it during the backpay period), will then give that individual's gross backpay.

In this and all methods when the work experience of other employees is used as the basis of the measure, care must be taken while examining the records from which data are taken that absences for reasons peculiar to the representative employee or employees are not allowed to affect the computation by, in effect, being charged to the discriminatee. In a backpay period of some duration, it may be necessary to use the earnings of several representative employees in succession (or as substitutes for periods of absence of more than 16 hours per week (see sec. 10564)) to measure the discriminatee's loss of pay, or, when a representative group is used, to find successors whose work experience, pay, etc., reasonably compare with that of original members of the group who drop out.

10542.2 *Criteria for Adopting Formula*

a. The gross company's records provide sufficient data to enable accurate identification of representative employees and computation of the basic average earnings or hours and ratios.

b. The representative employee, a substitute, or the representative group or their substitutes continue in the employ of the gross company during the entire backpay period. (The group may diminish in size during the backpay period, but this is almost inevitable in a period of significant length. All that is required is that the remaining members of the group continue to be representative in the same sense as the original group. An alternative to the diminished group is to add comparable employees to it as it decreases in size.)

c. This formula is applicable especially to long backpay periods, which feature pay and job changes. The "ratio" approach is especially applicable to situations when incentive methods of payment exist and the abilities of the individual workers result in wide disparities among their individual earning abilities. For more detailed explanation of the ratio procedure see section 10545.

10542.3 *Other Factors*

a. Backpay should normally include all earnings (including overtime), bonuses, and other perquisites of employment received by the representative employees.[2]

b. Care should be exercised to avoid charging excessive absenteeism of representative employees against the discriminatee. In employing this formula, in weeks of normal production, the earnings or hours of representative group members who worked less than 24 hours should be excluded from the computation.

If the earnings or hours of a single representative employee is serving as the basis of the computation, that employee's pay or hours for the weeks immediately preceding and following any weeks of excessive absence may be averaged to obtain the figure for the weeks of absence.

A possible error in applying this formula is the mechanical use of the earnings or hours of *all* the members of a representative group, particularly during the week of the separation of one member of the group from the gross company's employ. Often such separation occurs in the middle of a pay period. As a result, the inclusion of this person's pay for a partial week of work unduly reduces the average earnings or hours of the group. This is inaccurate and inequitable. Care should be taken to exclude from the average earnings or hours of representative employees earnings or hours for the first week of employment (because the person may have worked only part of the week and because the individual is a new employee who may not be able to earn as much as the older hands) as well as earnings for the last week of employment.

c. In cases of abolition of the sections, departments, etc., in which the discriminatees worked or large scale reductions in their staffs, it must not be automatically assumed that the discriminatees formerly in the unit would have been terminated and their backpay tolled. It is the respondent's burden to prove, as an affirmative defense, that there would not have been work available for the discriminatees. This burden is not sustained merely by the respondent showing either that no other employees were transferred or no replacements

[2] E.g., *Richard W. Kaase Co.*, 162 NLRB 1320, 1323 (1967); *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596, 1607 (1957).

were hired to do the work done by the discriminatees during the backpay period. Nor is it sufficient for the respondent to show that it never had as many employees after the discharge as prior thereto, or that the number of employees declined during the backpay period.[3]

In some circumstances it may be permissible for settlement purposes to make allowances for job nonavailability for specific discriminatees where the proof of this is highly convincing. But such otherwise litigable concessions for settlement purposes are not to be carried over into the computation of gross backpay in the backpay specification.

10542.4 *Sample Computation of Gross Backpay Formula Three:* A typical computation of gross backpay using the average earnings of a group of representative employees as the basis is shown below.

a. *Backpay Period:* February 12, 19xx - August 4, 19zz

b. *Excepted Periods:* None

c. *Rates of Pay:* Varying commissions

d. *Computation of Gross Backpay*

[3] E.g., *Biscayne Television Corp.*, 137 NLRB 430, 432–433 (1962), enfd. 337 F.2d 267, 268 (5th Cir. 1964). See also *Mastro Plastics Corp.*, 136 NLRB 1342, 1343, 1357–58 (1962), enfd. in relevant part 354 F.2d 170, 176 (2d Cir. 1965); *NLRB v. Ellis & Watts Products*, 344 F.2d 67 (6th Cir.), enfg. 143 NLRB 1269, 1271 (1963).

Year and calendar quarter	Average earnings representative group
19xx—Qtr. I (2/12-3/31)	$502
19xx—Qtr. II	1,182
19xx—Qtr. III	1,086
19xx—Qtr. IV	1,154
19yy—Qtr. I	1,090
19yy—Qtr. II	1,065
19yy—Qtr. III	1,128
19yy—Qtr. IV	998
19zz—Qtr. I	1,202
19zz—Qtr. II	1,212
19zz—Qtr. III (7/1-8/4)	428

10544 *Formula Four: Use of Earnings (or Hours) of Replacement Employee (or Employees) Who Worked in Job Similar to the Discriminatee's During the Backpay Period*

10544.1 *Description of Formula:* Sometimes there is no comparable employee who worked in a job similar in content and rate and conditions prior to the unfair labor practice and during the backpay period, as, for example, when as a result of a strike or when only an employee (or employees) hired after the unfair labor practice worked in the discriminatee's job during the backpay period. In such situations the earnings of replacement employee (or average earnings of replacement employees) per pay period may be a reasonable measure of what the discriminatee would have earned.[1]

When for some reason these earnings are not such a measure, then it may be possible to use the hours of the replacements through the same procedures already described under other methods above. Appropriate allowance for excessive absence of replacements must be made (see sec. 10542.3(b)). Thus, when the rates of pay, for example, of a group of replacement employees do not make their average earnings truly representative of what the discriminatee would have earned (not infrequently, the replacements, as new employees, are hired at lower rates of pay) then their average hours per pay period multiplied by the discriminatee's rate of pay (adjusted for changes which would have been made during the backpay period) may be a reasonable measure of what the individual would have earned.

[1] E.g., *C & D Coal Co.*, 93 NLRB 799, 803 (1951).

10544.2 *Criteria for Adopting Formula*

a. Company records contain data necessary to carrying out this formula. Difficulty may be encountered in cases when such records do not contain notations showing the job classifications of its employees thus making specific identification of replacements difficult. This may be overcome by obtaining the written statements of officials of the gross company providing this information. If the gross company is the respondent, this should be done *before* a determination is made as to which formula will be applied. If other formulas are clearly not applicable this difficulty can be overcome by expanding the group of replacement employees to include the entire section, department, etc., excluding supervisors, in which the discriminatee would have been employed absent discrimination.

b. The use of the other formulas discussed above is not possible or appropriate. When the formula is based exclusively on replacements as distinct from substitutes, it is less sensitive, generally, than those preceding.

c. This may be applied to short- or long-term backpay periods in situations when changes in pay rates, jobs, etc., take place during the backpay period.

d. This is appropriate to all kinds of wage payment systems—incentive, time rate, etc.

e. It is recommended that, when all replacement employees received the same rate of pay as the discriminatee and each other, backpay be based on their average *earnings*. In cases when there are differences in the hourly rates, their average hours should serve as the basis of the computation. (Note: The term "replacement employee" is to be construed literally only when the earnings of a single such employee are deemed to represent the probable earnings of a single discriminatee. In cases when a group of replacement employees is used as the basis for the backpay computation, these employees may consist of combinations of employees who worked prior to the unfair labor practice, new employees hired to replace the discriminatees, and any new employees subsequently employed to form part of the same working group whose jobs are comparable to the discriminatee(s).

10544.3 *Other Factors*

a. The factors set forth in section 10542.3 are equally applicable to Formula Four.

b. When new employees earn less than experienced employees during a learning period, this period—at least the first *full* week of employment—should not be included in averages of the earnings of replacement employees.

c. When members of a group of replacement employees are separated during the backpay period, their earnings or hours during the pay period of their separation (unless they worked the full pay period) should be excluded from computation of the group's average earnings or hours.

10544.4 *Sample Computation of Gross Backpay Formula Four:* A typical computation of gross backpay in accordance with this formula is provided below:

Year and quarter	Date—week ending	Amount earned by replacement employees	Number of replacement employees	Average earnings
19xx				
Qtr. I	1/9	$450	10	$45
	1/16	500	10	50
	1/23	495	[a] 9	55
	1/30	630	9	70
	2/6	600	10	60
	2/13	320	8	40
	2/20	750	10	75
	2/27	700	10	70
	3/6	540	[b] 9	60
	3/13	495	9	55
	3/20	360	9	40
	3/27	360	8	45
	4/3	450	9	50
Gross Backpay Qtr. I				$715
Qtr. II	4/10	605	[c] 11	55
	4/17	660	11	60
	4/24	700	10	70
	5/1	715	11	65
	5/8	550	11	50
	5/15	605	11	55
	5/22	400	10	40
	5/29	660	11	60
	6/5	715	11	65
	6/12	700	10	70
	6/19	800	10	80
	6/26	715	11	65
	7/3	770	11	70
Gross Backpay Qtr. II				$805

[a] Group of replacement employees numbered 10 through week ending 2/27. Numbers less than 10 indicate some of employees worked less than 24 hours in week and were not included.

[b] One of replacement employees quit this week reducing group to nine.

[c] Two new employees hired into group in the week ending 4/3.

10545 *Ratio Procedure:* When the discriminatee's pre-unfair-labor-practice earnings normally varied from the replacement's, it is sometimes necessary or desirable to use a ratio approach to computation. An example would involve a situation where the discriminatee's incentive earnings exceeded the replacement's by 5 percent. In such circumstances, the discriminatee's gross backpay may be computed as 105 percent of the replacement's.[1] The "ratio" approach is especially applicable to situations where incentive methods of payment exist and the abilities of the individual workers result in substantial disparities among their individual earning abilities. When applicable the ratio system may be used in any formula.

10546 *Adjusting Overtime Hours:* When overtime hours enter into backpay computation, it is simpler to make the calculation by adjusting the overtime hours (usually those in excess of 40 in a workweek) than by adjusting the hourly rate. The overtime hours are multiplied by the applicable premium rate, normally 1-1/2, the product added to the straight-time hours for the pay period, and the sum multiplied by the hourly rate to get the gross earnings.

If overtime hours are not adjusted, it would be necessary to obtain two average-hour figures to compute gross backpay (i.e., average straight-time and average overtime hours). To reach gross backpay, a double computation would be necessary (i.e., straight-time rate of pay times straight-time hours and overtime rates times actual overtime hours). Finally, both figures would have to be added to reach gross backpay. This is all avoided by the use of adjusted hours.

[1] E.g., *Story Oldsmobile*, 145 NLRB 1647, 1649–1650 (1964), enfd. 355 F.2d 28 (6th Cir. 1966); *Kaftarick, Inc.*, 111 NLRB 630, 633–634 (1955), enfd. 227 F.2d 190 (8th Cir. 1955).

10550–10568 *Gross Backpay: General Principles of Computation*

10550 *What Is Included in Gross Backpay:* Gross backpay generally includes all payments made to employees during the backpay period that the discriminatees would have received.[1] Some of these, in addition to wages paid, are bonuses, commissions, vacation pay, tips, pension fund contributions,[2] and pension benefits.[3]

10552 *Includable Items Not Subject to Interim Earnings Deduction:* Fringe benefits that the discriminatee would have received from or through the gross employer during the backpay period are usually included within the meaning of the Board's make-whole order.[1] Interim earnings are not deductible from these benefits. For this reason, Form NLRB-4312 does not lend itself to a computation involving reimbursement for fringe benefits except by including the amounts on the form through a footnote or addendum clearly ruled off within the space provided for item 6 (quarterly interim earnings and expenses) and

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[1] Examples of the variety of payments included in gross backpay are: *e.g., Underwood Machinery Co.*, 95 NLRB 1386, 1403 (1951) (promotions); *Peyton Packing Co.*, 129 NLRB 1275, 1276 (1961); *Indianapolis Wire-Bound Box Co.*, 89 NLRB 617, 642, 650 (1950) (loss resulting from discriminatory eviction); *McCarthy-Bernhardt Buick, Inc.*, 103 NLRB 1475, 1488 (1953); *C. Pappas Co.*, 82 NLRB 765, 767, 796 (1949) (commission increases); *Phoenix Mutual Life Insurance Co.*, 73 NLRB 1463, 1466 (1947) (commissions and renewals); *Stanton Enterprises*, 147 NLRB 693, 699 (1964), enfd. 351 F.2d 261 (4th Cir. 1965); *Home Restaurant Drive-In*, 127 NLRB 635 fn. 2 (1960) (tips); *Hickman Garment Co.*, 196 NLRB 428, 429 fn. 2 (1962), enfd. 471 F.2d 611 (6th Cir. 1972) (Christmas bonus); *Aerosonic Instrument Corp.*, 128 NLRB 412, 414 (1960) (incentive bonus); *Dinion Coil Co.*, 96 NLRB 1435, 1461 (1951), enfd. 201 F.2d 484 (2d Cir. 1952) (holiday pay); *Nabors v. NLRB*, 323 F.2d 686, 689–690 (5th Cir. 1963), enfg. in relevant part 134 NLRB 1078, 1085–1087 (1961), cert. denied 376 U.S. 911 (1964) (profit-sharing bonus); *International Trailer Co.*, 150 NLRB 1205, 1210, 1211 (1965) (incentive and leadership bonus); *Lee Cylinder Division of Gulay & Co.*, 184 NLRB 241, 242–243, 247 (1970), enfd. 447 F.2d 290, 294–295 (7th Cir. 1971) (wage increases, vacation pay, and insured medical expenses); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1126–1129 (1965), enfd. in relevant part 365 F.2d 888, 892 (D.C. Cir. 1966) (pension contributions); *Madison Courier*, 150 NLRB 781, Appendix A at 795 fn. x (1970), remanded on other grounds 472 F.2d 1307 (D.C. Cir. 1972) (insurance premiums and Christmas bonus); *Tennessee Packers*, 160 NLRB 1496, 1501 (1966) (sick); *Ellis & Watts Products*, 143 NLRB 1269, 1270 (1963), enfd. 344 F.2d 67 (6th Cir. 1965) (overtime); *Brown & Root*, 132 NLRB 486, 491 (1961), enfd. in relevant part 311 F.2d 447 (8th Cir. 1963) (shift differential); *Heinrich Motors*, 166 NLRB 783, 786 (1967), enfd. 403 F.2d 145 (2d Cir. 1968) (vacation pay); *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1713 (1965), enfd. in relevant part 360 F.2d 569, 572–573 (5th Cir. 1966) (safety awards); *L. J. Williams Lumber Co.*, 93 NLRB 1672, 1676, 1691 (1951), enfd. 195 F.2d 669, 672–673 (4th Cir. 1952), cert. denied 344 U.S. 834 (payments for transporting employees to plant); *Taylor Mfg. Co., Inc.*, 83 NLRB 142, 144 (1949) (Veterans Administration payments under G. I. program); *Raymond Pearson, Inc.*, 115 NLRB 190, 192, 210 (1956), enf. denied on other grounds 243 F.2d 456 (5th Cir. 1957) (employer ordered to pay to deceased discriminatee's estate any losses suffered with regard to bonuses, emoluments, insurance coverage, and other benefits accorded to employees by employer and which discriminatee would have enjoyed but for discharge); *Texas Co.*, 42 NLRB 593, 609 (1942), enfd. 135 F.2d 562 (9th Cir. 1943) (room and board). *DeLorean Cadillac*, 231 NLRB 329 (1977) (reimbursement for loss of use of company demonstrator car).

[2] See sec. 10552.3, fns. 7 and 8.

[3] See sec. 10552.5, fn. 6.

[1] E.g., *National Weaving Co.*, 7 NLRB 743, 750 (1938) (favorable utility rates); *Illinois Bell Telephone Co.*, 88 NLRB 1171, 1178 fn. 30 (1950) (pension rights); see also sec. 10550, fns. 1, 2, and 3.

clearly designated to describe what it is. The sections that follow show some of the types of fringe benefits for which reimbursement is sought.

10552.1 *Insurance or Plan Benefits:* Benefits such as life insurance, sickness, and hospitalization protection, etc., which the discriminatee, absent discrimination, would have received, usually pursuant to a group policy maintained at the gross employer, must be paid the discriminatee by the respondent.[2] However, instead of deducting interim earnings from such benefits when due, only similar benefits received in interim employment are to be deducted[3] and such computations need not be made on a quarterly basis as they should not be affected by gross backpay or interim earnings.[4]

Example: Discriminatee was in the hospital for 3 weeks during the backpay period and received $40 in sick benefits from an interim employer, but no hospital benefits. In accordance with the group health insurance plan in force at the gross company, discriminatee would have received $100 in hospitalization and would also have received $50 in sick benefits at the gross company.

The respondent must pay discriminatee:	
Sick benefits:	$ 50
Less	40
PLUS Hospitalization	100

or a total of $110 *plus* such net backpay as was due for the quarter.

Respondents should be advised that withholding taxes must not be deducted from payments of this kind inasmuch as they represent insurance benefits and not earnings taxable under FICA or the Internal Revenue laws.

Ordinarily, premiums the discriminatees would have paid for insurance benefits coverage are not deductible from gross backpay. However, such premiums are deductible when: (a) insurance benefits are collect-

[2] E.g., *East Texas Steel Castings Co.*, 116 NLRB 1336, 1377 (1956), enfd. 255 F.2d 284 (5th Cir. 1958); *Deena Artware*, 112 NLRB 371, 375–376 (1955), enfd. 228 F.2d 871 (6th Cir.); *Revlon Products*, 48 NLRB 1202, 1204–1205 (1943), enfd. 144 F.2d 88, 90 (2d Cir. 1944).

[3] E.g., *Glen Raven Silk Mills*, 101 NLRB 239, 250 (1952), modified on other grounds 203 F.2d 946 (4th Cir. 1953).

[4] See, e.g., *Teamsters Local 439 (Los Angeles-Seattle Motor Express)*, 194 NLRB 446, 449 (1971); *Artim Transportation System*, 193 NLRB 179, 184–185 (1971).

ed, or (b) the insurance company requires payment of back premiums in order to reinstate coverage retroactively, the discriminatees do not elect to waive such retroactive coverage, and the discriminatees would otherwise have been responsible for paying the premiums.

When employees purchase insurance coverage during the backpay period in lieu of coverage carried by the employer (in whole or in part) prior to the employee's termination, the additional cost of such insurance should be added to the backpay.

10552.2 *Extra Cost of Housing:* When the gross employer had provided housing to employees, either free or at a low cost, the difference between the cost of such housing and the amount the discriminatee had to pay for housing during the backpay period must be paid to the discriminatee. This amount is *not* subject to deduction by interim earnings[5] and is not to be included in Form NLRB-4312. Expenses for room and board in seeking or retaining interim employment are, on the other hand, to be deemed as such and deducted from interim earnings.

10552.3 *Pension Benefits and Contributions:* Reinstated discriminatees and claimants are entitled to the pension benefits or pension status they would have received but for the unfair labor practices[6] and to have payments made to the pension fund for the period of the discrimination or unfair labor practices.[7] When the claimant was not reinstated or reemployed or reinstatement or reemployment status was in doubt, the Board has directed in some circumstances that the pension contributions be paid to the discriminatee.[8]

10554 *Increases or Decreases in Pay Rates:* Generally, pay rate increases during the backpay period must be credited to the discriminatees in computing gross backpay.[1] This is always true in the case of "general" increases (i.e., those granted all employees in the same job

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[5] E.g., *Climax Spinning*, 101 NLRB 1193, 1207 (1952); *L. J. Williams Lumber Co.*, 93 NLRB 1672, 1676, 1691 (1951); *L. J. Williams Lumber Co.*, 96 NLRB 635, 636 (1951); *Sellers Mfg. Co.*, 92 NLRB 279, 280 (1950); *W. T. Carter & Bro.*, 90 NLRB 2020, 2027 (1950); *Abbott Worsted Mills*, 36 NLRB 545, 557 (1941), enfd. 127 F.2d 438 (1st Cir. 1942).

[6] E.g., *Fibreboard Paper Products Corp.*, 180 NLRB 142, 151–152 (1969).

[7] E.g., *Artim Transportation System*, 193 NLRB 179, 184–185 (1971); *Finishline Industries*, 181 NLRB 756, 760 (1970). Cf. *Fibreboard Paper Products*, supra at 152 (in which the Board held that, where payments to fund were contractually predicated on its maintaining actuarial soundness of fund rather than employee earnings, there was no obligation to make payments in addition to those necessary to maintaining actuarial soundness).

[8] E.g., *Rice Lake Creamery Co.*, 151 NLRB 1113, 1126 (1965), modified on other grounds 365 F.2d 888, 892 (D.C. Cir. 1966); *Richard W. Kaase Co.*, 162 NLRB 1320, 1326 (1967).

[1] E.g., *Richard W. Kaase Co.*, 162 NLRB 1320, 1323–1324 (1967).

category as the discriminatee). Problems arise, however, in determining whether and to what extent the discriminatees would have received pay rate increases that were not given to all employees during the backpay period. Frequently a fair solution to the problem is to give an individual employee the modal or typical increase but to give several discriminatees similarly situated the average or arithmetic mean of the relevant increases granted. The examples that follow show some ways to approach this problem.

10554.1 *Examples:*

a. All employees received pay rate increases as follows:

Employee A - 5 cents
Employee B - 10 cents
Employee C - 15 cents
Employee D - 10 cents
Employee E - 10 cents
Employee F - 10 cents
Employee G - 5 cents

The most numerous increase, i.e., that of 10 cents, should be credited a single discriminatee. The average increase, 9 cents, should be credited each discriminatee if more than one. Otherwise, the respondent would be compelled to pay more than it probably would have, absent discrimination.

b. There is only one discriminatee and the employees received pay increases as follows:

Employee A - 5 cents
Employee B - None
Employee C - None
Employee D - 15 cents
Employee E - 15 cents
Employee F - None
Employee G - 15 cents

Here, most of the employees received increases, hence the probability is that the discriminatee would have received an increase. The most numerous increase is 15 cents and this should be credited the discriminatee.

c. Same as b above but there are two or more discriminatees. It is not known which would or would not have received increases. The average increase was 50 cents ÷ 7=7. All discriminatees should receive a 7-cent increase since it is most probable that some of them would have received increases and that the average of the increases would have been the same as the average of the replacement group. Hence, in crediting this average increase to all the discriminatees, the respondent is not being required to pay more than, in all probability, it would have paid, absent discrimination.

d. The employees received pay increases as follows:

Employee A - 5 cents
Employer B - None
Employer C - None
Employer D - 10 cents
Employer E - None
Employer F - None
Employer G - 15 cents

It would be difficult here to support the contention that the discriminatee would have received an increase as most of the employees did not. However, if there are two or more discriminatees, the average increase (i.e., 30 cents ÷ 7=4 cents) should be credited them since it is probable one or more would have received an increase and, by granting all employees the average increase, the respondent is not being compelled to pay more than it probably would have paid absent discrimination. Care should be observed in applying this concept to avoid crediting pay increases to discriminatees when only a few among many incumbent employees receive them.

All the preceding methods assume that there is no evidence available to enable a judgment how any pay change policy of the respondent would apply to a specific discriminatee. When it can be *proven*, however, that a given discriminatee would have received the highest (or lowest) pay raise, the Region should proceed accordingly. Likewise, care should be taken not to include atypical employees (e.g., new employees not eligible for general increases, etc.) in the sample group.

The same principles are applicable to pay rate decreases.

10555 *Fewer Jobs Than Discriminatees:* In many cases, there are times, during the backpay period, when reduced levels of gross company operation occur. This often requires adjustments in gross backpay computations. (If reduced operations are caused by or connected with unfair labor practices, strikes, etc., this section does not apply.)

When there is an established *objective* system for determining priority among employees for job retention in layoffs, there would remain only the problem of applying the system to ascertain which of the discriminatees would have been laid off and the dates of such layoffs. When no such system exists, the two methods set forth below may be used in resolving the problem of how much backpay each discriminatee is entitled to.

10555.1 *Proportionalization:* Proportionalization is accomplished by computing the average earnings of the incumbents of all available jobs (when there are fewer jobs than discriminatees), computing the ratio of available jobs to discriminatees, and crediting each discriminatee with the average earnings of the incumbents multiplied by the ratio.[1] For example, if, as a result of an economic layoff during the backpay period, there are 5 jobs available in the department in which the discriminatees worked, and there are 10 discriminatees, the following computation would apply:

Total earnings for week, 5 jobs:	$250
Average earnings for week, 5 jobs:	$50
Number of discriminatees:	10
Ratio of jobs to discriminatees:	5/10 = 50%
Amount of gross backpay, each discriminatee:	$25

It may be observed that the same result can be achieved by dividing the total earnings of the incumbent employees among all the discriminatees. However, use of the ratio method is necessary in order that interim earnings may be reduced to accord with the reduced gross backpay. In the above example, only 50 percent of the interim earnings

[1] *Empire Worsted Mills*, 53 NLRB 683 (1943).

of each discriminatee should be deducted from gross backpay during the week of reduced job availability.

Note: This method cannot be used in cases when there is only one discriminatee. Further, every change in the dates of the discriminatees' availability for employment requires a complete recomputation of gross backpay for *all* discriminatees. For example, if in the above example, after computation it is found that one of the discriminatees was unavailable for work for a week, the gross, interim, and net backpay of *all* discriminatees will change for that week, viz.:

Total earnings for week, 5 jobs:	$250
Average earnings for week, 5 jobs:	$50
Number of discriminatees (this week):	9
Ratio of jobs to discriminatees:	5/9 = 56%
Amount of gross backpay, each discriminatee:	$28

Now, 56 percent instead of 50 percent of interim earnings is deductible—thus, net backpay will have to be recomputed for all discriminatees.

10555.2 *Seniority:* The problems involved in using the proportionalization method can be avoided by using the principle of seniority. The discriminatees and the incumbent employees are ranked in order of seniority (whether departmental, plantwide, etc., depends on the circumstances of each case) and, as fluctuations in employment at the plant take place, employment rights are established week by week, with the most senior of the entire group being presumed to have been entitled to work. Thus, in the week when there is enough work for only 5 employees and there are actually 5 employees and 10 discriminatees, the 15 are listed in order of seniority and the top 5 presumed to have been entitled to work in that week. If these five consist of two incumbents and three specific discriminatees, the three only will be entitled to full backpay for the week. Backpay for the other discriminatees is not credited them until employment rises. At that time, their

entitlement to backpay is realized as dictated by their relative seniority.[1]

This system is recommended for use whenever fluctuating employment conditions create situations of fewer jobs than discriminatees. In cases when, following completion of a computation, it is found that a discriminatee, whose seniority entitled him to backpay, was actually unavailable for work for a given period, he must be deleted from the computation for that time and the next person on the seniority list presumed to have been entitled to work then. If that person is a discriminatee, the backpay computation for him will have to be amended to include backpay for this period. Care must be taken, particularly when W-2 forms or SSA reports of earnings are the source of interim earnings information, to avoid deducting interim earnings for weeks within a quarter when gross backpay does not accrue.

10560 *Backpay Computation During Strikes and Plant Shutdowns:* There are situations in which, although the gross employer's plant is shut down or operating at unusually low levels, backpay continues to accrue, e.g.:

a. Discriminatee is discharged and then strike or lockout occurs. Backpay should be computed during the period of the strike or lockout.[1] When an employee is discharged during the strike, backpay accrues from the date of the employee's discharge.[2]

b. Employees are locked out in violation of the Act and plant is shut down. Backpay continues to accrue during the lockout,[3] even though the employees go on strike during the lockout.[4]

In these cases, the average hours or earnings of the discriminatees in a normal period before the shutdown may be projected through the period of plant shutdown, or the average earnings or hours of representative or replacement employees in a normal period, immediately

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[1] *Hill Transportation Co.*, 102 NLRB 1015 (1953); *United Butchers Abattoir*, 123 NLRB 946, 959 (1959); *Palmer-Bee Co.*, 65 NLRB 492 (1945).

[1] E.g., *East Texas Steel Castings Co.*, 116 NLRB 1336, 1339–1340 (1956), enfd. 255 F.2d 784 (5th Cir. 1958); *Merchandiser Press*, 115 NLRB 1441, 1442 (1956).

[2] *Abilities & Goodwill*, 241 NLRB 27 (1979).

[3] See, e.g., *E. C. Brown Co.*, 81 NLRB 140, 141 (1949), enfd. 184 F.2d 829 (2d Cir. 1950); *Bullick & Schwalm Co.*, 95 NLRB 1262, 1266 (1951), enfd. 198 F.2d 477 (3d Cir. 1952) (employees locked out on return from strike).

[4] E.g., *Somerset Shoe Co.*, 12 NLRB 1057, 1059 (1939), modified 111 F.2d 681 (1st Cir. 1940).

prior to or following the shutdown, may be used as a basis for gross backpay.

10562 *Effect of Unfair Labor Practice on Gross Backpay Computation:* Often, immediately preceding the occurrence of an unfair labor practice, there will be a certain amount of turmoil and disturbance in a plant that has an adverse effect on the earnings and hours of employees. When this is the case, such earnings and hours must not be used in computing averages on which gross backpay will be based.

If such abnormal conditions occur after the unfair labor practice and are fairly attributable to the plant turmoil related to the unfair labor practice or organizational activities or other temporary influences, it is proper, in computing the gross backpay, to ignore actual earnings, hours, jobs, etc., during such time and project to the period a normal set of data from a close (in time) untroubled period.[1]

10564 *Absenteeism:* Whatever formula is used for computing gross backpay, respondents often complain that no allowance is made for normal absenteeism. They contend that it is the very rare person who works each full scheduled workweek regularly over a long period of time with no absences whatever. They point out that, in reporting illnesses, etc., for backpay purposes, the discriminatees do not report short periods of absence from work. It is, they contend, an impossible burden for them to prove this.

These arguments have some validity. Consequently, the 24-hour method of allowing for normal absenteeism has been developed and approved by the Board.[1] This method operates as follows:

a. *When the Scheduled Workweek is 5 Days or More:* In computing the average hours or earnings of representative or replacement employees (see sec. 10542) those working 24 hours or more in a given week are included in the computation.

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[1] E.g., *Hill Transportation Co.*, 102 NLRB 1015, 1021 (1953).

[1] E.g., *Ozark Hardwood Co.*, 119 NLRB 1130, 1158, 1163 (1957), modified on other grounds 282 F.2d 1 (8th Cir. 1960); *Harvest Queen Mill Co.*, 90 NLRB 320, 344 (1950) (Appendix A). As the procedure herein described includes the normal absenteeism of the substitute or replacement in the computation (*Harvest Queen Mill Co.*, supra, fn. 3; see also *Empire Worsted Mills*, 53 NLRB 683, 691–692 (1943), enfd. 129 F.2d 668 (2d Cir. 1942)), once this procedure is followed, making a separate deduction for normal absenteeism would be a double deduction.

b. *When the Scheduled Workweek is 4 Days:* The hours or earnings of employees who worked 16 hours or more are included in the computation.

c. *When the Scheduled Workweek is 3 Days or Less:* All employees are included in the computation.

The scheduled workweek is the number of days worked by most of the employees in the department, plant, etc. and can readily be ascertained by scanning the payrolls of the gross employer.

d. *Application to Formulas One and Two:* When using the formula based on pre-unfair-labor-practice average earnings or hours of the discriminatee, the 5-day weeks when that person worked less than 24 hours should be deleted from the average (see secs. 10538 and 10540). A workweek consisting of less than 5 scheduled workdays should be deleted. The effect of this method is to assure that normal absenteeism is taken into account without unduly depressing the critical averages by including people who were away from work for more than 2 days in a 5-day week.

e. *Recognition of Extraordinary Attendance Records:* When evidence is available showing that a specific discriminatee had an extraordinary attendance record with no or a negligible amount of absenteeism, this may form a basis for computing backpay with no absenteeism allowance at all.[2] Thus, when the hours or earnings of replacement or representative employees is the measure of backpay, the earnings or hours of such employees when they worked less than full time should not be included in the computation.

10568 *Preliminary Estimates of Net Backpay:* Preliminary estimates of net backpay due should be prepared in the larger, more complex cases only (i.e., when a comprehensive computation will take some time). In the simpler cases, when comprehensive computations can be made quickly, the preparation of such estimates may be a waste of time. The compliance officer must make the decision whether or not to prepare an estimate in any case, complex or simple.

After the following steps have been completed, the compliance officer, having decided to do so, is ready to prepare an estimate of net backpay:

[2] E.g., *Famet, Inc.*, 222 NLRB 1180 (1976).

a. The case record has been read and the background of the case is thoroughly understood.

b. The company's records have been reviewed and an overall understanding of what has occurred in the employer's plant, insofar as pay rate changes, job changes, etc., has been obtained.

The estimate of gross backpay should be made quickly. Figures may be rounded off to the nearest $10, but generally should follow as closely as practicable the path that will be taken ultimately when a detailed computation of backpay is made. The ingenuity of the compliance officer will best determine how this should be done in individual cases to arrive at as accurate an estimate of net backpay as possible. Absent clearance from the Division of Operations Management, the quarterly method should be used. Absent countervailing considerations, a discriminatee's gross backpay for one period might be estimated by ascertaining the earnings for a corresponding period of time and increasing or decreasing it by the increase or decrease in earnings of the average employee in the plant, department, or classification as may be appropriate. Similarly, any other equally reasonable method of approximation may be used. This, of course, saves time spent in prolonged gross backpay computations. From this figure there should be deducted the individual's interim earnings. Each discriminatee's entitlement should be separately computed and deductions from gross backpay should not be pooled and deducted from the pooled gross backpay of several discriminates. Any estimating procedure, and the computations based thereon, is subject to review by the General Counsel absent acceptance by all parties and all discriminatees (sec. 10772) and therefore should not be proposed or accepted without such a caveat to the parties.

10580–10600 *Interim Earnings*

10580 *Maintaining Contact With Potential Claimants; Executed Forms Required:* Although from a legal point of view it is the respondent's burden to prove interim earnings and other factors that may mitigate the loss caused by it, as a practical matter the Regional Office assembles interim earnings data from various sources and will concede amounts that the discriminatee admits were earned at interim employment in the backpay period or that are otherwise verifiable. In this way it may be possible to compute the amount of net backpay actually due to induce voluntary compliance with the Board's make-whole remedy by the respondent. Thus, in addition to computing gross backpay, the compliance officer is also responsible for getting and keeping in touch with discriminatees and obtaining their cooperation in order to assemble interim earnings and other information needed to determine backpay and to distribute it.

The compliance officer verifies at the outset that the administrative steps required to be taken on issuance of the complaint (see sec. 10269) have been taken, and that the file contains appropriate numbers of Forms NLRB-916 and 4180 executed by each discriminatee. Any oversights in this regard should be remedied quickly, especially if the case involves strikers who have been refused reinstatement on application at the end of a strike. Such claimants, absent prompt identification and communication, tend to become much less identifiable and locatable with the passage of time. All persons who may be entitled to backpay or reimbursement under a Board remedy should also be sent Form NLRB-4685 (Notification of Change of Address), Form NLRB-4288 (Information on Backpay For Employees), Form NLRB-5224 (Claimant Expense, Search for Work, and Interim Earnings Report), and inquiry should be made to verify that the addresses for them in the file are current.

10582 *Missing Discriminatees:* If, at the backpay stage of a case, Forms NLRB-916, 4180, and 4685 are for some reason not available or, despite their presence in the file, contact with the discriminatee has been broken, there are several avenues for locating missing discriminatees that the compliance officer should explore.

10582.1 *Inquiries of Friends, Relatives, or References; Personnel Records:* Form NLRB-916 contains the addresses of friends or relatives. Inquiries should be made of these persons to locate the discriminatee. If

the gross employer maintains personnel files, references given by the discriminatee in the application for employment and other information in the personnel file may be helpful in locating the individual.

10582.2 *Inquiries Through the Social Security Administration:* This method involves transmitting to the *Social Security Administration Headquarters, Baltimore, Maryland 21235*, a letter in an unfranked, unstamped, unsealed envelope, bearing no return address. This envelope should be addressed to the discriminatee by name and social security number only. The space where the address is inserted should be left blank. The SSA will send the letter "care of" the last employer of record in a forwarding letter of its own. If the letter is not delivered, the SSA will advise the compliance officer. This letter should enclose a Form NLRB–916 and request that the discriminatee fill it out and mail it to the Regional Office. It should also advise the discriminatee of the status of the case and importance of cooperating. A franked return envelope should be enclosed in our letter.

10582.3 *Inquiry of Discriminatee's Union:* If the discriminatee is a union member, either the local or international union may be able to provide a current address.

10582.4 *Discriminatees With Past or Present Service in the Armed Forces or Merchant Marine:* The addresses of discriminatees presently on duty with the Armed Forces or Merchant Marine, or the last known address of individuals with past service in such organizations, may be obtained by sending a letter containing a brief statement of the reason why the address is desired, or by making telephonic inquiry, to one of the following offices (depending on the degree of contact the individual has maintained, the last known address may or may not be current):

Active Reserve, Inactive Reserve, or Retired:

Officers—All Services:

National Personnel Records Center
9700 Page Street
St. Louis, Missouri 63132
Telephone (FTS) 273–1000

Enlisted:

National Personnel Records Center, supra. However, in the case of enlisted personnel the following telephone numbers should be used:
Army: (FTS) 273-7261
Air Force: (FTS) 273-7243
Navy, Marine Corps, and Coast Guard:
(FTS) 273-7171

Military Personnel on Active Duty:

Army: Worldwide Locator, Ft. Benjamin Harrison
Indianapolis, Indiana 46249-5301
Telephone 317-542-4211

Air Force: Worldwide Locator, U.S. Air Force
Military Personnel Center, Randolph A.F.B.
San Antonio, Texas 78150-6001
Telephone 512-652-5774

Navy: Worldwide Locator, Bureau of Naval Personnel
Arlington Annex
Washington, D.C. 20370
Officer Records: Telephone 202-694-3155 or 2579
Enlisted Men Records: A-K, Telephone 202-694-2925
L-Z, Telephone 202-694-1527

Marine Corps: Commandant U.S. Marine Corps,
Code M.S.R.B.-10, U.S.M.C.
Washington, D.C. 20390
A-E, Telephone 202-694-1624
F-L, Telephone 202-694-1861
M-R, Telephone 202-694-1610
S-Z, Telephone 202-694-1913
Any letter, Telephone 202-694-2380

Merchant Marine and Coast Guard:
Records and Directory, U.S. Coast Guard
Attn: Merchant Vessel Personnel
400 7th Street, S.W.
Washington, D.C. 20590
Telephone 202-426-1515

10582.5 *Longshoremen:* In the longshore industry, longshoremen may sometimes be located through public or quasi-public bodies that now regulate hiring procedures in certain ports.

10582.6 *Motor Vehicle Bureaus; Other Licensing Authority:* When operators' and other licensed individuals' license numbers are known, or are keyed to names or social security numbers, discriminatees may sometimes be located through the State Motor Vehicle Bureau even after the license has been transferred to another State. Other licensed individuals (e.g., taxi drivers) may be similarly located through other licensing authorities.

10582.7 *U.S. Postal Service:* In appropriate circumstances (e.g., by requesting notice of change of address) the present address of a discriminatee may be ascertained when direct mailing is unsuccessful.

10582.8 *Newspaper Advertising:* Because of technical statutory requirements concerning advertising, this means of locating missing discriminatees should not be resorted to without clearance from the Division of Operations Management.

10582.9 *Inquiries Through the Internal Revenue Service:* After all other efforts to locate backpay claimants have been exhausted, correspondence may be forwarded through the IRS. The Region's request should be addressed to the *Disclosure Operations Division, Internal Revenue Service, Department of the Treasury, Washington, D.C. 20224.* IRS, depending on its workload, will be able to forward the Region's letter(s) within 3 weeks. IRS *will not* advise whether the letter was returned or that IRS does not have an address for the individual, as such might reveal whether the individual filed an income tax return and would represent an illegal disclosure of tax information.

When the Region has *less than 50* letters that require forwarding, the letters should be transmitted together with the request for assistance. When IRS is being asked to forward more than 50, but *less than 100* letters, the Region should telephonically contact the Director of IRS, or one of his assistants, to arrange for assistance *prior* to submitting the letters. In any situation when the Region wants IRS to forward *more than 100* letters, an *advance written request* for assistance should be submitted.

At the time a request for assistance is made, the names and Social Security numbers of each individual must be included. The list of names should be arranged in sequential order by Social Security number, not alphabetically by name.

Any letter submitted to the IRS for forwarding *must* include the following paragraph:

> This letter is being mailed to you by the Internal Revenue Service because the National Labor Relations Board does not have your current address. The Internal Revenue Service, which has no interest in this matter, aside from forwarding the letter to you, has not disclosed your address to us.

The letter(s) prepared by the Region will be mailed to the individual by IRS in an IRS envelope.

The IRS charges for this service. Thus, a determination should be made whether utilization of the service is cost effective. However, generally, the IRS does not charge for this service unless the request involves 50 or more names. For requests of less than 50 names, the request may often be processed by the local IRS office and can be handled in a relatively short period of time. Thus, although other means of locating discriminatees should be explored before resort to the IRS tracing procedure, the use of the IRS procedure should not be overlooked, inasmuch as it provides an efficient and effective means to locate discriminatees.

10584 *Procedure for Handling Claims of Noncooperative, Missing, and Deceased Discriminatees*

10584.1 *Noncooperative Discriminatees:* The remedies afforded by the Act are public, not private, rights. The enforcement of the Act cannot be left to the whims or indolence of claimants. The right to the reinstatement and backpay claim of a noncooperative discriminatee may be eliminated or compromised for purposes of an overall settlement that results in compliance with the Board's order in most other respects. This will be done only after written notice of the consequences of a refusal to cooperate has been given the discriminatee, it is known that the discriminatee is not missing, and there is no evidence that the refusal to cooperate arises from a plan to subvert the Board's processes. But in the event of a formal hearing, the discriminatee should be

subpoenaed to testify about interim earnings, etc., if this is deemed necessary. Meanwhile, when no information has been supplied about interim earnings, such earnings may be listed as zero on the backpay specification.

10584.2 *Missing Discriminatees:*

a. *Specification and Hearing Procedures:* If a backpay hearing is to be conducted, missing discriminatees should be included in the backpay specification. (See sec. 10656.10.) Procedures at the hearing relative to these are noted at section 10734.

b. *Voluntary Compliance Procedures:* If interim earnings information is available, net backpay should be calculated. If interim earnings information is not available, gross backpay should be computed. In either case, the respondent should be advised of the backpay amounts and that these amounts will be paid and disbursed according to the procedures in sections 10644, 10648.5, and 10649.5.

c. *Proportionate or Lump Sum Compliance Procedure:* On occasion the arguable differences over the amount of backpay due missing discriminatees may be resolved for purposes of settlement by providing for payment of some amount less than the maximum (gross) claimed due. If interim earnings information of missing discriminatees is not available, an amount equal to the average net interim earnings of other discriminatees similarly qualified and situated as the missing discriminatee(s) may be used to reduce his/her gross backpay. If there is only one discriminatee or if there are insufficient located discriminatees to calculate an average interim earnings amount, interim earnings for the missing discriminatees shall be calculated at the rate of 75 percent of gross backpay.

Checks are not prepared for the missing discriminatees and the balance of the settlement that thus is not distributed should be placed in escrow (sec. 10648.5). In the case of a lump-sum payment, as missing discriminatees come forward during the escrow period (10644), they furnish interim earnings information, etc., their maximum net backpay is computed, and either the Finance Section or the respondent, as appropriate, will be requested to pay them their proportionate share from the undistributed balance. See section 10648.5.

If at the end of the escrow period, there is still an undistributed balance, it is distributed to all discriminatees who can be located, on the same basis as at the outset, the ratio of their maximum net backpay to the amount of money remaining to be distributed, due regard being taken of the rule: *de minimis non curat lex.*

If, because of this rule, it is not feasible to distribute the balance, it is returned to the respondent.

10584.3 *Deceased Discriminatees:* If the discriminatee has died before executing Form NLRB-4180, next of kin should be asked to execute two copies of "Authorization to Social Security Administration to furnish Employment and Earnings Information of Decedent (NLRB-4181)," on the basis of which earnings can be obtained from the SSA. One copy of the authorization, with a covering memorandum, should be sent to the *Director in Charge of Accounting Operations, Social Security Administration, Baltimore, Maryland 21235*, requesting such data.

The fact that no interim earnings can be obtained because of the death of a discriminatee is not a reason for abandoning that claim for backpay.[1]

In any formal proceeding the burden would be on the respondent to prove the discriminatees' interim earnings and lack of search for work. In view of this burden, and if the Board has exhausted its efforts to discover the interim earnings of the deceased discriminatee, if the respondent is unable to prove that the deceased discriminatee actually earned any money or was unavailable for work, it should be requested to pay gross backpay as full net backpay to the estate of the deceased discriminatee.

10590 *Social Security Administration Report: Content and Analysis:* As the result of Public Law 94–202, effective January 1, 1978, a Combined Annual Wage Report (CAWR) system is now being used by the Department of the Treasury and the SSA. Employers are no longer required to list quarterly earnings for each employee in their Quarterly Federal Tax Return (Form 941). SSA now receives only an *annual*

[1] Includable in backpay is the amount of insurance or death benefits that the discriminatee would have had, absent discriminatory discharge (*Revlon Products*, 48 NLRB 1202, 1204–1205 (1943), enfd. 144 F.2d 88, 90 (2d Cir. 1944)), deducting therefrom the death benefits from applicable interim employment, if any. *Glen Raven Silk Mills*, 101 NLRB 239 (1952), modified on other grounds 203 F.2d 946 (4th Cir. 1953).

wage report from employers setting forth individual employee earnings (Form W-2) for the year.

Therefore, *quarterly* earnings information is available from SSA for periods prior to January 1, 1978. Annual wage information is available for periods beginning January 1, 1978, and thereafter. However, annual wage information for the year is not available until the next year—usually early during the first quarter.

When annual earnings information is still desired, notwithstanding the above-noted limitations, Form 4180 may be submitted. Form 4180 *must* be received by SSA within 60 days following any date appearing on the form. Thus, if the form is dated, it would be advisable to obtain two additional updated copies of the Form 4180 from each discriminatee on the tolling of the backpay period, in the event that this procedure will be used to secure interim earnings information.

When analyzing the SSA report, remember that: it does not provide precise dates of employment; it reports only earnings subject to FICA withholdings; and earnings in excess of the statutory wage limitation (sec. 10649.1) may not be reflected in the report.

10592 *Interview of Discriminatees on Interim Earnings, Expenses, and Search:* Each individual discriminatee should be interviewed personally or by telephone to review and update search, interim earnings, and expense information already available in the case file. At this time the discriminatee can be asked to provide specific dates of beginning and termination of interim employment. In addition, the discriminatee may be able to recall and provide information concerning wages received in previously disclosed employment during the backpay period. Such income tax deduction forms, paycheck stubs, etc., showing interim earnings as the discriminatee may have, should be obtained and made a part of the file. Explanation of all periods of low earnings and unemployment should be obtained and all periods of unavailability for work determined (see sec. 10740).[1]

10594 *Request of Previous Interim Employers for Information:* If additional information appears to be needed about specific interim employment and earnings (except as to current employment), interim

[1] See *American Navigation*, 268 NLRB 426 (1983); *Ad Art*, 280 NLRB 985 (1986), and cases cited therein; situations where failure of discriminatee to truthfully report information relating to backpay may result in complete or partial denial of backpay.

employers may be asked for it. A letter of the following pattern may be sent to *past* employers:

Pattern 6 - Interim Earnings Letter

(DO NOT SEND TO DISCRIMINATEE'S CURRENT EMPLOYER)

RE: [Case Number Only]

Gentlemen:

In a case in which your firm is not involved in any way, we need a report on earnings received by _____, whose social security number is _____, and the dates between which the individual was employed by you. We need this information to secure compliance in the above case with [a settlement agreement; an administrative law judge's decision; an order of the National Labor Relations Board; a judgment of a U.S. court of appeals].

You may find it convenient to make this report by using the form at the end of this letter, which can be returned with the letter in the enclosed postage-paid envelope. As the form indicates, in addition to the dates of the individual's employment we need the gross amounts earned in each calendar quarter within those dates. Please include quarters in which amounts were not reported or only partially reported for social security tax purposes because of the limit on the maximum earnings taxable under FICA in a calendar year the gross amount this employee actually earned in such quarter or quarters.

Your cooperation in this matter will be greatly appreciated.

Yours truly,

_____

Compliance Officer

Case No. _____

Earnings of _____ Soc. Sec. No. _____

Employed between _____ and _____

Gross earnings by calendar quarters:

Year:	1	2	3	4
19				
19				
19				
19				

_____
(Name of firm)

_____
(signature)

10595 *Verifying Interim Earnings From Current Employer:* If information is needed from the current employer, the discriminatee may be asked to get a statement from that employer in a form similar to that shown on the Pattern 6 letter and with the same requirement that the actual gross earnings in each calendar quarter be given.

10596 *Interim Earnings From Railroad Employment:* Reports of the interim earnings of discriminatees who, during the backpay period, were employed by railroads may be obtained from the *Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611.* A form "Authorization to Furnish Information" (Railroad Retirement Board Form No. G-154), signed by the discriminatee, must be transmitted to the Railroad Retirement Board by the compliance officer. A supply of such forms is obtainable from the Railroad Retirement Board at the above address.

10598 *Earnings Reports From State Unemployment Insurance Agencies:* One Region has reported success in arranging for obtaining interim earnings from state unemployment insurance agencies in its

area. The regional compliance officers may wish to attempt similar arrangements in their Regions.

10600–10610 *Analysis and Computation of Interim Earnings Data*

10600 *Correlating Interim Earnings With Gross Backpay Periods:* In setting forth the interim earnings of the discriminatee in item 6 of Form NLRB-4312, only interim earnings for periods during which gross backpay is accruing should be entered. If, for instance, no gross backpay accrued for a specific week within the calendar quarter, discriminatee's interim earnings for that week should not be counted in the computation.[1] It is clear that, in order to perform this deletion precisely, the discriminatee's exact earnings for each week in the calendar quarter would be necessary. When this information is not available, it may be estimated by an apportioning procedure or inferred from an analysis of the Social Security report.

10600.1 *Apportioning Procedure:* If there is a specific week (or period of time) in a calendar quarter in which gross backpay did not accrue for any reason and the discriminatee worked at interim employment during such week or period, the interim earnings for that week (or period) should not be deducted from gross backpay for the quarter. In many cases even though the interim earnings information may be available only for the total calendar quarter, the amount to exclude can be estimated by deducting an appropriate fractional part of interim earnings for the total quarter based on one-quarter equaling 13 weeks. So, to exclude 1 week, deduct one-thirteenth of the quarter's interim earnings, for 2 weeks exclude two-thirteenths, etc. (If the discriminatee did not work the entire calendar quarter but it is known how many weeks were worked, the same procedure can be used by changing the denominator of the fraction to the number of weeks worked.) Thus, when an employee worked 10 weeks of a calendar quarter, 1 of which was not includable in gross backpay, the quarterly interim earnings would be reduced one-tenth.[2]

10602 *Interim Earnings That Are Deductible From Gross Backpay; Earnings From Self-Employment:* Self-employment is not to be equated with failure to search for interim employment. Therefore periods of self-employment are not to be excluded from the gross backpay

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[1] E.g., *San Juan Mercantile Corp.*, 135 NLRB 698, 699 (1962); *Painters (Spoon Tile Co.)*, 117 NLRB 1596, 1598 (1957); *Decker Truck Lines*, 139 NLRB 65, 68 (1962) (part-time employee's interim earnings deducted at same percent as gross computed).

[2] E.g., *East Texas Steel Castings Co.*, 116 NLRB 1336, 1346–1347 (1956), enfd. 255 F.2d 284 (5th Cir. 1958).

period.[1] Self-employment involves the receipt of income for work or services performed or goods sold to persons who do not stand in the relation of employer to the recipient. Earnings from self-employment are deductible from gross backpay, but not all receipts are deductible. As in all enterprises conducted for profit, only the balance after the deduction for costs and expenses of doing business represents earnings from self-employment.

In the absence of books and records of the business kept by an accountant, and financial statements prepared from them, U.S. income tax returns are probably the best starting point for data on the earnings of self-employed persons who have gone into business for themselves after having been discharged in violation of the Act. Note, however, that when a substantial source of revenue is the discriminatees' invested capital in the business, then some adjustment of the income from the business should be made to apportion earnings between the part resulting from their invested capital and that from services. The usual method of doing this is to deduct the interest that would have been paid by the discriminatee to a willing lender of the investment capital (not the conventional legal interest).

As profits are usually computed on an annual basis, to deduct them from gross backpay computed by calendar quarters it is usual to prorate them over the calendar quarters in proportion to the portions of the quarters covered by the backpay period. When the discriminatee was traditionally self-employed (i.e., prior to the unfair labor practices) second job principles apply (see sec. 10606).

10602.1 *Tips and Other Perquisites of Employment:* Other forms of earnings from interim employment such as tips of barbers, taxicab drivers, and restaurant workers, and perquisites of interim employment such as room and board and the use of an automobile are, when evaluated in terms of dollars, deductible from gross backpay as interim earnings.[2]

10604 *Monetary Receipts Not Deductible From Gross Backpay*

[1] E.g., *Cashman Auto Co.*, 109 NLRB 720, 722 (1954), enfd. 223 F.2d 832, 835–836 (1st Cir. 1955); *Mastro Plastics Co.*, 136 NLRB 1342, 1350 (1962), enfd. in relevant part 354 F.2d 170, 179 (2d Cir. 1965); *W. C. Nabors Co.*, 134 NLRB 1078, 1092–1093, 1097 (1961), enfd. on this point 323 F.2d 686, 690–691 (5th Cir. 1963); *Hyster Co.*, 220 NLRB 1230 (1975), enfd. 548 F.2d 807 (9th Cir. 1977), cert. denied 431 U.S. 955 (1977).

[2] E.g., *Empire Worsted Mills*, 53 NLRB 683, 692 (1943); but see *I. Posner, Inc.*, 154 NLRB 202, 214–215 (1965), for circumstances under which a perquisite of interim employment may not be deductible from gross backpay.

10604.1 *Unearned Income; Unemployment Insurance; Gifts; Gambling; Union and Government Aid; Workmen's Compensation:* Such receipts as union benefits, home relief payments, and unemployment insurance payments and the portion of workmen's compensation benefits not attributable to lost wages[1] are not considered interim earnings, hence are not deductible.[2] The general rule in evaluating any particular kind of receipt to determine whether it is in fact interim earnings is: If money was received in payment for work or services performed, it may be regarded as interim earnings. Gifts, winnings from gambling, stock market operations, etc.,[3] are not interim earnings.

10604.2 *Interim Earnings in Periods Excepted From Gross Backpay Not Deductible:* Such earnings are not deductible from gross backpay. (See sec. 10600 and cases cited.)

10604.3 *Overtime Employment Exceeding Available Overtime at Gross Employer Not Deductible:* Under any theory of mitigation of damages the discriminatee is not obliged to work overtime to reduce the respondent's backpay obligation. Accordingly, earnings from overtime employment substantially exceeding the overtime the discriminatee would have worked at the gross employer are not deductible.[4]

10604.4 *Interim Earnings Based on Hours in Excess of Those Available at Gross Employer Not Deductible:* A corollary of sections 10604.2 and 10604.3 is that a discriminatee is not obliged to work additional hours over and above those that would have been worked for the gross employer to reduce discriminatee's own backpay settlement.[5] Although such additional work normally takes the form of overtime, the rule is equally applicable whenever the discriminatee in a given quarter works hours substantially exceeding those that would have been worked for the gross employer; e.g., in a situation when gross backpay is computed on the basis of an estimated 30 hours of

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[1] E.g., *American Mfg. Co. of Texas*, 167 NLRB 520, 523 (1967); *Sioux Falls Stock Yards Co.*, 236 NLRB 543 fn. 4 (1978).

[2] E.g., *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); *Florence Printing Co.*, 158 NLRB 775, 781–782 (1966), enfd. 376 F.2d 216, 218–220 (4th Cir. 1967); *Standard Printing Co.*, 151 NLRB 963, 966–967 (1965); *Burk Bros.*, 21 NLRB 1281, 1299 fn. 5 (1940), enfd. 117 F.2d 686 (3d Cir. 1941), cert. denied 313 U.S. 588 (but the Board's rule of nondeductibility of work-relief projects payment no longer had any force after *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940).

[3] E.g., *Press Co.*, 13 NLRB 630 (1939), modified and enfd. 118 F.2d 937 (D.C. Cir. 1940), cert. denied 313 U.S. 595 (severance pay); *Empire Worsted Mills*, 53 NLRB 683, 693–695 (1943) (legacy-gift).

[4] E.g., *United Aircraft Corp.*, 204 NLRB 1068, 1073–1074 (1973).

[5] See, e.g., *United Aircraft*, supra.

employment per week, interim earnings from employment averaging in excess of 30 hours per week should not be deducted.

10604.5 *Disproportionate Hours of Interim Employment Computed Quarterly:* In determining whether to exclude interim earnings under sections 10604.3 and 10604.4, the quarterly method of computation should be used.

10606 *Supplementary Employment (Moonlighting):* The situation is occasionally encountered in which the discriminatee earns income from two separate jobs during the backpay period. Is income from the second or supplementary job deductible as interim earnings? The general rule is that if the discriminatee had held the second job prior to the unfair labor practice and continued to hold it during the backpay period, the earnings from that job are not deductible as interim earnings.[1] Or if the discriminatee changed such supplementary employment during the backpay period without altering its supplementary nature, earnings from the job are not deductible. For instance, when discriminatee is a part-time musician prior to the unfair labor practice and continues to work at such *part-time* occupation in evening hours during the backpay period albeit for different employers, those earnings are not deductible.

Even though the discriminatee had no supplementary job prior to the unfair labor practice but, thereafter, held two separate jobs simultaneously, whether both were full time or one of the two was a part-time job, only the earnings from one full-time job are to be regarded as interim earnings.[2]

Supplementary earnings can be converted to interim earnings in the following circumstances: the discriminatee held a second supplementary job prior to the unfair labor practice; after the unfair labor practice, full time was devoted to the formerly supplementary job. It is assumed that, in the absence of discrimination, the discriminatee would have continued the part-time work, so only the increase in earnings attributable on a proportional basis to the increased time spent at the self-employment or the second job is deductible from gross backpay.[3]

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[1] E.g., *Acme Mattress Co.*, 97 NLRB 1439, 1443 (1952), and fn. 1 of Supplemental Intermediate Report for the early cases; see also *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1710 (1965), enfd. on this point 360 F.2d 569, 573 (5th Cir. 1966).

[2] E.g., *Miami Coca-Cola Bottling Co.*, supra, 1710 fn. 24.

[3] E.g., *Golay & Co.*, 184 NLRB 241, 245 (1970), enfd. 447 F.2d 290 (7th Cir. 1971), cert. denied 404 U.S. 1048 (1972); *Rice Lake Creamery Co.*, 151 NLRB 1113 fn. 4 (1965), enfd. in relevant part, modi-

10610 *Expenses Deductible From Interim Earnings:* Allowable expenses of the discriminatee during the backpay period are deducted from interim earnings, *never added to gross backpay.*

Discriminatees are entitled to a reduction from their interim earnings in the amount of expenses incurred in seeking work or working elsewhere that would not have been incurred had the discriminatee continued to work at the gross company.[1] Such items customarily include extra transportation costs incurred in finding and maintaining interim employment; employment agency fees; room and board when the employee works away from home; moving expenses, when working elsewhere necessitates moving of family and household effects; and union dues if employee is compelled to pay such dues as a condition of employment. Capital losses incurred through the sale of personal possessions are not allowable expenses.

Although desirable, it is not necessary for the discriminatee to support claim for expenses by specific receipts or other documentary evidence. Experience indicates that most discriminatees are reluctant even to make a claim for expenses. Their creditable statement to the effect they had expenses and their recollection about the amount of such expenses should be sufficient for the compliance officer to include them in the computation of backpay. In many backpay hearings, the only support for a claim for expenses has been the testimony of the discriminatee.

Expenses become irrelevant to any change in monetary return if, during the calendar quarter in which they are incurred, there are no interim earnings. However, if the expenses were incurred in the course of a search for work, this should be noted in the backpay computation inasmuch as the claim tends to support the discriminatee's statements concerning a search for work. It should be clearly noted that no charge

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fied and remanded on others 365 F.2d 888 (D.C. Cir. 1966); *Moss Planing Mill Co.*, 110 NLRB 933, 946–947 (1954), modified on other grounds 256 F.2d 653 (4th Cir. 1958).

[1] E.g., *Crossett Lumber Co.*, 8 NLRB 440, 497–498 (1938); *Herman Bros. Pet Supply*, 150 NLRB 1419, 1422–1424 (1965), enfd. 360 F.2d 176 (6th Cir. 1966) (mandatory dues, uniforms, and transportation necessary for interim employment); *Reynolds Pallet Co.*, 155 NLRB 384, 387 (1965), enfd. 399 F.2d 668 (6th Cir. 1968) (mileage and per diem while seeking interim employment); *Gary Aircraft Corp.*, 210 NLRB 555 (1974) (10 cents per mile was found to be a reasonable mileage rate, notwithstanding changes in mileage reimbursement rates for Government employees); *Nelson Metal Fabricating*, 259 NLRB 1023 (1982) (mileage rate of 17 cents, rate used by IRS with respect to business vehicle use, not unreasonable); *Pugh & Barr, Inc.*, 102 NLRB 562, 566 (1953), remanded on other grounds 207 F.2d 409 (4th Cir. 1953), supplemental 110 NLRB 1353 (1954), enfd. 231 F.2d 558 (4th Cir. 1956) (transportation and living expenses until permanently relocated); *Harvest Queen Mill Co.*, 90 NLRB 320, 331–332, 334, 338, 340–341 (1950) (reasonable expenses); *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1710 (1965), enfd. 360 F.2d 569, 574–575 (5th Cir. 1966) (hiring hall fees).

is being made for such expenses during quarters when interim earnings are not stated.

10612–10626 *Unavailability for Work*

10612 *Generally:* When a discriminatee becomes unavailable gross backpay does not accrue until discriminatee becomes available again, except that in certain circumstances, as when failure to earn specific amounts of money was caused by an unjustified quitting or refusal to accept an appropriate interim job, gross backpay does not stop accruing but these amounts are deducted from it as though they were actual interim earnings.[1]

Strictly speaking, the backpay of a discriminatee who is found to have failed to make a reasonable search for work during the backpay period is not tolled. Gross backpay does accrue for such a period but in the absence of evidence of what the discriminatee would have earned "the Board assumes that any other employment would have yielded earnings equal to that of the work from which the discriminatee had been discharged."[2] As the discriminatee's potential interim earnings during such period of unavailability equal the gross backpay that accrues, no net backpay is found to be due.

A discriminatee's unavailability for work can occur in a number of ways. Some instances of such unavailability are: Failure to make a reasonable effort to seek work during periods of unemployment, rejecting suitable employment when unemployed, unjustified quitting, or being discharged from interim employment because of misbehavior, injury, illness, maternity, service in the Armed Forces,[3] attendance at school, and confinement in institutions or hospitals. See sections 10614–10620.

10612.1 *Unavailability Because of Injury or Illness Attributable to Interim Employment or Unfair Labor Practices:* In certain situations, however, unavailability through an injury suffered at interim employment, or an illness fairly attributable thereto, may not toll backpay.[4]

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[1] E.g., *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1703–1704 (1965), enfd. in relevant part 360 F.2d 569, 575 (5th Cir. 1966); *Mastro Plastics Corp.*, 136 NLRB 1342, 1352 (1962), modified on other grounds 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966); *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1215 (1961). See also *Phelps Dodge Corp. v. NLRB*, 113 F.2d 202, 206 (2d Cir. 1940), affd. on this point 313 U.S. 177, 197–198 (1941).

[2] E.g., *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596 fn. 7 (1957), citing *Laister-Kauffmann Aircraft Corp.*, 63 NLRB 1367, 1369 (1945).

[3] Backpay liability is also tolled by entry into the Armed Forces, but on discharge liability commences again. *Ozark Hardwood Co.*, 119 NLRB 1130, 1133 (1957), modified in other respects 282 F.2d 1 (8th Cir. 1960).

[4] E.g., *American Mfg. Co. of Texas*, 167 NLRB 520, 522–523 (1967); see also *M.E.A. Milling Co.*, 170 NLRB 1079 (1968), enfd. in relevant part and remanded on another point 463 F.2d 953 (D.C. Cir. 1972).

Similarly injuries resulting from unfair labor practices may not toll backpay.[5]

10614 *Rejection of, Quitting, Discharge From Interim Employment:* In cases of this kind, all the circumstances surrounding the discriminatee's action should be carefully examined to determine whether the quitting was justified or the discharge was for cause.[1] (For method of computation, see sec. 10612.)

10616 *Search for Work:* Although a reasonable grace period is allowable[1] and lowering of the sights is not necessary in all circumstances,[2] a discriminatee is expected to make reasonable efforts to obtain other work at least within several weeks after discharge or, if the termination has been made equivocally as by a failure to recall after a layoff, after expectation of being rehired is no longer reasonable. The efforts a discriminatee is expected to make to get interim employment are those expected of reasonable persons in like circumstances, which include age, health, education, employment history, and station in life, as well as employment and unemployment trends in the area where discriminatee resided when discrimination occurred, in the usual case.[3] (See also sec. 10616.3.)

10616.1 *Registration With State Employment Service:* One element indicating that a reasonable effort has been made to seek work consists of continued active registration for work with a state employment service. However, this is not conclusive in the determination of the question, *nor will its absence necessarily demonstrate lack of diligence.* A discriminatee should normally, in lieu or in addition, make such

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[5] E.g., *Moss Planing Mill Co.*, 103 NLRB 414, 419 (1953), enfd. 206 F.2d 557 (4th Cir. 1953).

[1] E.g., *J. H. Rutter-Rex Mfg. Co.*, 158 NLRB 1414, 1494 (1966), modified on other grounds 399 F.2d 356 (5th Cir. 1968), modification reversed 396 U.S. 258 (1969) (quitting in contemplation of reinstatement by respondent); *Florence Printing Co.*, 158 NLRB 775, 792 (1966), enfd. 376 F.2d 216 (4th Cir. 1967) (moving to other locality not required); *Mastro Plastics Corp.*, 136 NLRB 1342, 1349, 1352, 1367, 1369–1370, 1372, 1374, 1375, 1377–1380, 1385–1386, 1392, 1394, 1396 (1962), modified on other grounds 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966) (danger, unsuitability, and undesirability of interim job; lack of substantial equivalence); *Bonnar-Vawter, Inc.*, 135 NLRB 1270, 1273 (1962) (denial of promised job and concomitant wage cut and travel requirements); *L. B. Hosiery Co.*, 99 NLRB 630, 631 (1952) (poor lighting), enfd. 34 LRRM 2144 (3d Cir. 1954), cert. denied 347 U.S. 976. Unjustified quitting for a lower paying job does not toll. Backpay however is instead reduced by the amount of the difference. *Somerville Cream Co.*, 106 NLRB 1155, 1157 (1953).

[1] E.g., *Saginaw Aggregates*, 198 NLRB 598 (1972), and cases cited fn. 3.

[2] E.g., *Madison Courier*, 202 NLRB 808, 810–811 (1973).

[3] Registration with the state employment service, perusal of newspaper ads, going to visit employers in person, and asking friends and relatives are all indicia of an active search for work, but the presence or absence of any one of them is not decisive. *Efco Mfg.*, 111 NLRB 1032, 1036 (1955), enfd. 227 F.2d 675, 676 (1st Cir. 1955), cert. denied 350 U.S. 1007 (1956). See also *Mastro Plastics Corp.*, 136 NLRB 1342, 1388–1389 (1962).

search for work as would be expected of reasonable individuals in like circumstances.

The term "state employment service" used above is not the title of any single state government employment service but is used herein to cover all state employment services. Titles vary with the State. For instance, in Tennessee the state employment service is called the Tennessee Department of Employment Security. In discussing registration at such state employment services with discriminatees, it is best to ask also about registration for "unemployment insurance" rather than to name the specific state employment service. It has been found that most discriminatees identify such registration with their attempts to obtain unemployment insurance.

Discriminatees normally apply at their state employment service not only to seek employment, but also to collect unemployment insurance benefits. In doing so, they are required to fill out a job application form, which is kept in an active file by the placement officer of the service usually for about 60 days beyond the date of the discriminatee's last registration and is then transferred to an inactive file. The placement officer of the service uses this file as a source for referring people to jobs. As long as unemployment insurance is collected, the discriminatee must register every week and certify ability and willingness to work. The discriminatee is given an applicant identification card, which bears the date to report and the next scheduled reporting date. Registration at the state employment service should be considered to extend 60 days beyond the last reporting date.

10616.2 *Interviewing Discriminatee Concerning Reasonable Search:* When the discriminatee is interviewed about searching for work, discriminatee should be requested to provide all such applicant identification card forms (see sec. 10616.1) that may have been used during the backpay period. In addition, discriminatee should be closely questioned concerning the specific places and times work was sought. Particular attention must be paid to long periods of idleness and thorough explanation with details of search for work, such as the time and place of all applications for work, whom the discriminatee spoke to, who went along, if written applications were filed with specific companies, etc., should be obtained to support a claim for backpay for such periods. (See sec. 10616.3 for the interviewing of marginal and disadvantaged employees.)

10616.3 *Marginal and Disadvantaged Employees:* Especially difficult problems are encountered when the discriminatees are handicapped, aged, unskilled members of minority groups, or women.[4] Such people are often the first to be laid off and the last to be hired. They often become extremely discouraged in their attempts to seek work, particularly in labor markets of limited extent. A fair estimate of the reasonableness of the search must take this fact into account. This class of discriminatee suffers most from unfair labor practices. Accordingly, their cases require special efforts to understand, determine, and evaluate their claims of reasonable search and availability. Women sometimes revert to the status of housewives during periods of unemployment. Every effort must be made to distinguish whether, during the period they were housewives, they were actually still seeking work. If they were, their backpay rights should be uninterrupted.

10616.4 *Door-to-Door Search:* Although studies of the techniques used by most workers to obtain work indicates that employment is found most often by methods other than the continuous door-to-door search, and most employees do not engage in this type of activity for any lengthy period of time, the Board and the courts view as relevant such overt activities as the door-to-door search in finding that a reasonable search for work was made.

10616.5 *Other Relevant Search Activities:* In addition, such activities as registration with employment agencies, whether public or private, and continuous discussions with friends and family members concerning avenues of employment are indications of a reasonable search for work.

10618 *Other Types of Unavailability for Work*

10618.1 *Pregnancy:* When a discriminatee is pregnant, the period of her unavailability normally coincides with the period she would have taken but for the discrimination. This is not a matter of formula, but a factual question that may be established by any relevant evidence (medical certificates or evidence, including the evidence or certificate of her own physician, the duration of leave actually taken in connection with the current or past pregnancies, etc.) provided such

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[4] E.g., *Pugh & Parr, Inc.*, 110 NLRB 1353, 1355 fns. 1 and 2 (1954), enfd. 231 F.2d 558 (4th Cir. 1956); *Mastro Plastics Corp.*, 136 NLRB 1342, 1373, 1388, 1390 (1962), enfd. in relevant part 354 F.2d 170, 179 (2d Cir. 1965); *Cornwell Co.*, 171 NLRB 342, 343 (1968); *Keller Aluminum Chairs Southern*, 171 NLRB 1252, 1256–1258 (1968), enfd. 425 F.2d 709, 711 (5th Cir. 1970); *Golay & Co.*, 184 NLRB 241, 243–244 (1970), enfd. 447 F.2d 290, 295 (7th Cir. 1971).

past or current pregnancy leaves were voluntarily taken or legally required by the employer. However, unavailability for backpay purposes should not be predicated on employer maternity leave requirements exceeding that which the discriminatee would have taken where such a condition of employment is illegal under relevant equal opportunity laws. Essentially, any claim of abatement of backpay because of pregnancy represents a claim of unavailability for work on which the respondent has the burden of proof. To the extent the claim is not fairly established, it should not be allowed.

10618.2 *Illness, Military Service, and Institutional Confinement:* Except when it results from the unfair labor practice or the nature of the interim employment (sec. 10612.1) or the discriminatee would have received sick leave pay from the gross employer,[1] discriminatees are to be regarded as unavailable for work when they are ill for periods of over 3 days, in the Armed Forces, or when confined in institutions. However, if there is a sick leave or other plan in effect at the gross company, payments thereunder are to be credited the discriminatee in accordance with such plan (subject to reduction by plan payments received in interim employment). (See sec. 10612.1 for the rule where illness or injury results from interim employment or unfair labor practices.)

10618.3 *Attendance at Educational Institution:* During a period when a discriminatee was in full-time attendance at an educational institution, backpay should normally not be allowed. But the usual presumption of unavailability for employment because of school attendance may be rebutted by such things as a demonstration of continued efforts to secure work while attending school, attendance at a school because a search for work is futile, and the discriminatee's willingness to forsake school at any time for suitable employment or reinstatement.[2]

Attendance at on-the-job training in connection with interim employment, however small the remuneration, does *not* constitute unavailability for work.

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[1] See, e.g., *Harvest Queen Mill Co.*, 90 NLRB 320, 323 fn. 4 (1950).

[2] E.g., *J. L. Holtzendorff Detective Agency*, 206 NLRB 483, 484–485 (1973); *American Compress Warehouse*, 156 NLRB 267, 275 (1965), enfd. 374 F.2d 573 (5th Cir. 1967); *Lozano Enterprises*, 152 NLRB 258, 259, 264–265 (1965), enfd. 356 F.2d 483 (9th Cir. 1966); cf. *Laurels Hotel & Country Club*, 193 NLRB 241, 247 (1971).

10620 *Discriminatees Who Have Retired:* Discriminatees who have retired during the backpay period are not automatically to be viewed as having withdrawn from the labor market. This largely depends on the facts of each individual's situation. If the discriminatee, although retired and collecting social security pension, actively sought work, such person must be considered available for employment and entitled to backpay.

10622 *Burden of Proof of Unavailability; Compliance Negotiations Concerning Willful Idleness; Circumstances Requiring Clearance:* Although the burden of proving that a discriminatee was unavailable for work is on the respondent at backpay hearings, it is the General Counsel's policy to investigate unavailability. This is incident to attempting to obtain voluntary compliance or to settle a case. It is also necessary to a proper evaluation of the merits of each case. All possible corroborating evidence that reasonable searches for work were made should be mustered to support contentions that the individual discriminatees were in fact available for work during all periods of unemployment.

Experience indicates that willful idleness claims (i.e., rejecting or quitting suitable employment, discharge from such employment because of misbehavior or the failure to make a reasonable search) often present factual issues that would best be resolved by a hearing. As the Region must clear a party's or a discriminatee's objection to compliance before closing (sec. 10772), the compliance officer should not give the impression of allowing a willful idleness claim in whole or in part. Any such claim should be treated as a settlement problem in which offers and counteroffers are exchanged for the express purposes of arriving at mutual agreement. Lest it be construed as a ruling on the willful idleness claim or waiver of the discriminatee's right, proposals to the parties predicated on allowing the willful idleness claim in whole or in part should not be dealt with by correspondence or other writing unless it is expressly noted that no ruling has been made on the willful idleness issue and the discussions are undertaken for settlement purposes only.

Similarly willful idleness should only be conceded in the backpay specification when evidence of such idleness is clear. Any doubtful situations should be cleared with Division of Operations Management before inclusion. Of course, when it is known that the discriminatee was unavailable for work because of illness, maternity leave, induction in the Armed Forces, or confinement in an institution, this should be stated on the computation and backpay tolled or abated for such periods.[1]

[1] See generally *American Navigation*, 268 NLRB 426 (1983); *Ad Art*, 280 NLRB 985 (1986); and cases cited therein.

10623–10626 *Final Net Backpay; Addition of Interest*

10623 *Interest*

10623.1 *Computing Interest on Backpay:* Interest on backpay will be assessed at the rate in effect pursuant to Board law.[1] Interest will accrue beginning with the last day of each calendar quarter of the backpay period on the amount due and owing for each quarterly period and continuing until compliance with the order is achieved.[2] Accordingly, interest should be computed in all cases involving backpay that are settled before or after issuance of complaint and after issuance of the administrative law judge's decision.

In accordance with accepted business and financial practices, interest is usually computed on the basis of a 360-day year and 30-day months. As the *Woolworth* formula breaks the computation of net backpay into as many separate computations as there are calendar quarters in the backpay period, it has been found convenient to determine the time element on a daily basis (using 360-day years, 90-day calendar quarters, and 30-day months to break the period down to days) and to compute interest for each calendar quarter in which net backpay accrued.

10623.2 *The Annual Interest Rates and Their Effective Dates:*

Effective Dates	*Annual Rate*	*Effective Dates*	*Annual Rate*
Prior to July 1, 1975	6%	January 1, 1984 to June 30, 1984	11%
July 1, 1975 to December 31, 1977	7%	July 1, 1984 to December 31, 1984	11%
January 1, 1978 to December 31, 1979	6%	January 1, 1985 to June 30, 1985	13%
January 1, 1980 to December 31, 1981	12%	July 1, 1985 to December 30, 1985	11%
January 1, 1982 to December 31, 1982	20%	January 1, 1986 to June 30, 1986	10%
January 1, 1983 to June 30, 1983	16%	July 1, 1986 to September 30, 1987	9%
July 1, 1983 to December 31, 1983	11%	October 1, 1987 to December 31, 1987	10%

10623.3 *Alternative Methods: Calculation of Interest*

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[1] *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987, as amended August 26, 1987); *Florida Steel Corp.*, 231 NLRB 651 (1977); see also *Harvey Hubbell, Inc.*, 285 NLRB No. 22 (July 30, 1987); *Industrial Metal Fabricators, Inc.*, 285 NLRB No. 46 at fn. 2 (Aug. 10, 1987).

a. When using the number of days to compute interest, the formula for calculating interest would be as follows:

Net backpay x *accrued days* x *interest rate factor* = *interest*

The interest rate factor is calculated, for example, as follows:

If the annual interest rate is 6 percent, the interest rate factor on a daily basis is 0.0001667 (i.e., .06 ÷ 360); on a monthly basis it is .0050 (i.e., 30 x 0.0001667); and on a calendar quarter basis it is 0.0150 (i.e., 90 x 0.001667 or 3 x 0.0050).

b. To further illustrate, the relevant annual interest rates, the daily, monthly, and quarterly interest rate factor, and the interest rates for relevant periods are set forth below:

RATE FACTOR

Annual interest rate	*Daily*	*Monthly*	*Quarterly*
6	.0001667	.005	.015
7	.0001944	.0058333	.0175
12	.0003333	.01	.03
20	.0005556	.0166667	.05
16	.0004444	.01333331	.04
11	.0003055	.0091667	.0275
13	.0003611	.010833	.0325
10	.0002777	.0083333	.025
9	.0002500	.0075	.0225

c. Reciprocal of the Annual Interest Rate:

An alternative to computing interest by the above formula is to use reciprocals for the daily rate factors that are set forth above. When using reciprocals for interest computation, the appropriate formula is as follows:

Net backpay x *accrued days* ÷ *reciprocal of daily interest rate* = *interest*

d. The reciprocals of the daily rate factors for relevant interest rates are as follows:

6%	6000	11%	3273
7%	5143	13%	2769
12%	3000	10%	3600
20%	1800	9%	4000
16%	2250		

10623.4 *Sample Calculation of Interest:* In this example, the backpay period begins on January 1, 1975, and it terminates on January 31, 1982, the date the discriminatee was reinstated. The backpay will be paid on April 30, 1984. The net backpay for the first quarter 1975 is $650. The interest began running on this net backpay on March 31, 1975, the last day of the quarter in which the discrimination occurred, and the interest continues to run through the date of payment. The net backpay of $650 must be multiplied by the number of accrued days of interest at each applicable interest rate that was in effect, up until the date of payment, as set forth below:

Portion of Backpay Period in Which Interest Accrued	*No. of Accrued Days*	*(Interest Rate in Effect)*	*Daily Interest Rate Factor*	*Net Backpay*	*Interest*
3/31/75	1	(6%)			
4/1/75–6/30/75	90	(6%)			
Total days	91	×	.0001667	× $650.00 =	$9.86
7/1/75–12/31/75	180	(7%)			
1/1/76–12/31/76	360	(7%)			
1/1/77–12/31/77	360	(7%)			
Total days	900	×	.0001944	× $650.00 =	$113.72
1/1/78–12/31/78	360	(6%)			
1/1/79–12/31/79	360	(6%)			
Total days	720	×	.0001667	× $650.00 =	$78.02
1/1/80–12/31/80	360	(12%)			
1/1/81–12/31/81	360	(12%)			
Total days	720	×	.0003333	× $650.00 =	$155.98
1/1/82–12/31/82	360	(20%)			
Total days	360	×	.0005556	× $650.00 =	$130.01

Portion of Backpay Period in Which Interest Accrued	*No. of Accrued Days*		*(Interest Rate in Effect)*	*Daily Interest Rate Factor*		*Net Backpay*		*Interest*
1/1/83–6/30/83	180		(16%)					
Total days	180	×		.0004444	×	$650.00	=	$51.99
7/1/83–12/31/83	180		(11%)					
1/1/84–4/30/84	120		(11%)					
Total days	300	×		.0003055	×	$650.00	=	$59.57
			Total Int.				=	$599.15

Thus, total interest on the net backpay of $650 for the first calendar quarter of 1975 is $599.15. A similar calculation would be performed for the net backpay accruing in the second calendar quarter 1975, the third calendar quarter 1975, and so on, until the last quarter or portion thereof in the backpay period. Each calendar quarter net backpay, therefore, may have several rates of interest applied to it over the course of the backpay period and up through the date of payment. In calculating interest, the daily rate, monthly rate, or quarterly rate of interest may be used or, if preferred, the reciprocal rate may be used as an alternative method.

10623.5 *Interest Not Subject to Payroll Deductions:* Respondents should be instructed to deduct social security and withholding taxes on the amount of backpay but not on the interest (sec. 10648.1).

10623.6 *Interest on Lump Sum Settlement:* When compliance is based on a lump sum figure, the interest is estimated and included in the settlement by making separate interest computation for each quarter of this period on the assumption that in the absence of contrary evidence the total amount to be paid to the discriminatees accrued by calendar quarters in the same proportions that the duration of each calendar quarter in the backpay period bore to the duration of the total backpay period *(Isis Plumbing)*. Thus, in a total backpay period of 240 days, which covered 3 calendar quarters, with 85 days falling in the first quarter, 90 in the second, and 65 in the third and for which the amount of net backpay agreed on was $15,000, interest would be computed under *Isis Plumbing* as though $5,312.50 of backpay had accrued in the first quarter of the period (85/240 x $15,000), $5,625 in the second (90/240 x $15,000), and $4,062.50 in the third (65/240 x $15,000). Interest on the first, second, and third quarters is then computed as provided above. Differences will often be avoided if the formula for computing

interest is explained and agreed at the same time as the lump sum figure is reached.

The steps shown in section 10624.4 are for illustrative purposes only and may be shortened by the use of reciprocals or gathering constants, etc.

10623.7 *Interest: When Computed:* Because interest cannot be finally determined until the date of payment, it serves no useful purpose to compute it until the payment date is ascertained. Accordingly, it is not normally included in backpay specifications and proffered compliance figures, although controversy will be avoided if it is expressly stated that interest as prescribed by the *Isis*[3] formula subsequently will be added to the backpay computation being proffered or the specification.

10623.8 *Interest on Installment Payments: Computation:* The simplest method of computing interest on installment payments is to compute interest on the total backpay to the date of the first installment payment and add interest to each subsequent installment payment calculated from the date of the first installment payment to the date the subsequent installment is paid.

10623.9 *Extension of Interest Doctrine to Dues, Fees, and Other Forms of Monetary Remedies:* Interest shall be paid, not only on backpay, but also on reimbursement of dues, fees, assessments, welfare fund benefits, and Christmas bonuses, etc.[4]

10624 *Preparing Comprehensive Computation of Net Backpay:* The use of Form NLRB-4312 for computing gross and net backpay is advocated wherever possible. This will contain the gross backpay computation in items 1 through 5, one sheet for each calendar quarter. An itemized statement of the interim earnings, expenses, and periods of unavailability for work (excluding periods of willful idleness, inadequate search for work, etc. (sec. 10622)), should be set forth in item 6. In doing this, a special effort should be made not to deduct interim earnings for excepted periods, which are noted in the upper right hand corner of the form, and not to deduct all interim earnings in a quarter

[3] *Isis Plumbing Co.*, supra; *Florida Steel*, supra; and/or *New Horizons for the Retarded*, supra, as applicable.

[4] E.g., *Seafarers*, 138 NLRB 1142 fn. 3 (1962); *Quality Coal Corp.*, 139 NLRB 492, 498 (1962); *J. J. Hagerty, Inc.*, 139 NLRB 633, 639–640 (1962); *Exchange Parts Co.*, 139 NLRB 710 fn. 12 (1962).

in which overtime or other employment substantially exceeded in amount the quarterly overtime or other employment on which the gross backpay figure was computed. (For a discussion of the underlying principle see sec. 10604.) Thus, in a quarter in which gross backpay is predicated on 360 hours of employment, a discriminatee who worked 720 hours of interim employment would have deducted no more than the earnings from 360 hours interim employment.

The form is a combined worksheet and final copy. It should be filled out *legibly* in pencil and then checked for accuracy, erasing, and substituting correct figures where needed. After it is satisfactorily completed, a sufficient number of *photostatic* copies should be made for the user's needs. The photostatic method is urged as a labor-saving device. For, if the forms are typed from the penciled copy, then inevitably typographical errors will result, necessitating:

a. Proofreading the typed copy against the original.

b. Correcting the errors detected.

The method suggested will eliminate the work of typing, proofreading, and correcting errors. The photostatic copies may be used as appendixes to backpay specifications. In cases where a multiplicity of such forms are necessary, it may be desirable to use other methods of presenting the necessary data. This is a matter for the discretion of the compliance officer.

10624.1 *Instructions for Preparation of Form NLRB-4312:* "Excepted Periods" space: Fill in only on the sheet for the quarter in which excepted periods occur. If "none," state this.

Lines 1, 2, and 3: Several spaces are provided to account for changes in rates of pay within a quarter. Otherwise only a single vertical column will be used. Place dashes in all unused spaces.

The method for computing interest, which is incorporated in Form NLRB-4312, may be simplified by assuming that each full month in the period for which interest is due consists of 30 days. (See sec. 10623.1.)

There is no need to repeat information such as "Job Title," "Social Security No.," etc., on sheets below the top sheet for any given discriminatee. However, the last name of the discriminatee and the case

number should be repeated in case one of the pages in the computation becomes detached from the rest.

Round all figures to the nearest dollar.

When all interim earnings are not to be fully deducted from gross backpay (as for example, because they were earned in an excepted period, i.e., one in which backpay did not accrue or because they were earned through working substantially longer hours than were available at the gross employer, secs. 10604.3, 10604.4), this should be stated in the specification after the point therein when the admitted interim earnings are listed. Thus when the discriminatees had worked substantially longer hours at interim employment it should be stated.

> The interim earnings in calendar quarters 19xx-4, 19yy-1 and 2, and 19zz-1 do not include earnings for hours worked in excess of the number of hours [the discriminatee] would have worked for the respondent.

In the specification set forth in section 10656.13, this would be inserted at the conclusion of the counterpart of 9E, 10E, and/or 11E. In the specification set forth in section 10656.14, it would be set forth in a separate subparagraph.

The following samples show two different types of computation. Sample 1, which illustrates the hourly basis computation, indicates the use of this form for quarters in which two pay increases were awarded. Sample 2 illustrates the weekly basis computation and indicates how to carry out the apportionment referred to at section 10600.1. Sample 3 illustrates the computation of interest in lump sum settlements, referred to in section 10623.4.

10624.2 *Sample 1:* Illustration of hourly basis computation for quarter in which two pay increases were awarded.

COMPUTATION OF BACK PAY — YEAR: 19YY — QUARTER: 1

CASE NO.: 22-CA-22 — EXCEPTED PERIOD(S): None

NAME: Brown, A. — SOCIAL SECURITY NO.: 000-00-0000

JOB TITLE AND DEPARTMENT: sewer – sewing

BACK PAY COMPUTATION FOR CALENDAR QUARTER

1. NUMBER OF (HOURS) DAYS OR WEEKS	300	120	80	
2. (HOURLY) DAILY OR WEEKLY RATE OF PAY	$ 1 00	$ 1 10	$ 1 20	
3. PRODUCT (ITEM 1 X ITEM 2)	$ 300 00	$ 132 00	$ 96 00	
4. BONUS AND OTHER (Vacation)				$ 50 00
5. QUARTERLY TOTAL GROSS BACK PAY				$ 578 00

6. QUARTERLY INTERIM EARNINGS AND EXPENSES	EARNINGS	EXPENSES
XYZ Corp. Atlanta, GA	150 00	
TOTALS	$ 150 00	$

7. QUARTERLY NET INTERIM EARNINGS	$ 150 00
8. NET BACK PAY FOR QUARTER (Item 5 minus Item 7)	$ 428 00
9. INTEREST (See Note below) FROM THROUGH No. days	$ interest
10. TOTAL NET BACK PAY PLUS INTEREST (Item 8 plus Item 9)	$

NOTE: Interest will not be computed, usually, until a tender of the backpay due has been made or a date for payment has been agreed upon, since interest accrues until that date.

10624.3 *Sample 2:* Illustration of computation of interim earnings and expenses that are apportioned (sec. 10600.1). Computation is on weekly basis.

COMPUTATION OF BACK PAY

YEAR: 19YY | QUARTER: 4

CASE NO.: 22-CA-22

NAME: Jones, F. | SOCIAL SECURITY NO.: 000-00-0000

EXPIRED PERIOD: 11-1-YY to 11-9-YY

JOB TITLE AND DEPARTMENT: sawyer - Lumber Mills

BACK PAY COMPUTATION FOR CALENDAR QUARTER

| | | |

10624.4 *Sample 3:* Illustration of computation of interest due on a lump sum settlement of backpay. (See also sec. 10623.4.)

COMPUTATION OF INTEREST ON LUMP SUM | YEAR | QUARTER

CASE NO. | EXCEPTED PERIOD(S)

NAME Doe, John | SOCIAL SECURITY NO.

JOB TITLE AND DEPARTMENT

Amount of backpay - $550.00
Start of backpay period - 5/15/xx
End of backpay period - 10/22/xx
Date of payment - 9/6/yy

(1) Calendar Qtrs.	(2) Days of Backpay Accrued	(3) Apportionment of Backpay to Calendar Qtrs.		(4) Days of int. accrued to 9/6/yy		(5) Int. Rate for 1 day		(6) Int. due 9/6/yy
19xx, 2d	45	45/159 x $550 = $158	x	425	x	0.0000167	=	$11.21
19xx, 3d	90	90/159 x $550 = $315	x	335	x	0.0000167	=	$17.62
19xx, 4th	22	22/159 x $550 = $ 77	x	245	x	0.0000167	=	$ 3.15
	157	$550						$31.98

NOTE: The example above illustrates the basic method for computing interest on a lump sum. Depending on the functions available on a particular calculator, the steps indicated above can be shortened.

TOTALS

8. BACK PAY $ 550 00

9. INTEREST (See Note below) FROM THROUGH No. days $ 31 98 interest

10. TOTAL BACK PAY PLUS INTEREST (Item 8 plus Item 9) $ 581 98

NOTE: Interest will not be computed, usually, until a tender of the backpay due has been made or a date for payment has been agreed upon, since interest accrues until that date.

10626 *Letter to Respondent Requesting Payment of Backpay:* If following a court judgment it appears formal backpay procedures will be necessary, upon completion of the computation, the Regional Office usually requests the respondent in writing to pay the amounts due. (Such request may be made earlier under appropriate circumstances.) A suggested form for such letter appears below.

Dear Mr. _____:

As you know, the [Board's order; circuit court of appeals' judgment] in the above-captioned case, issued on [date], requires that the persons named therein be reimbursed for the wages they lost because of [their discharge, your refusal to hire, etc.]. On the basis of information appearing in [your company's, the company's] records, we have computed the amount each of the discriminatees would have earned had they not been discharged [had you not refused to employ them, etc.]. As a result of our interviews with the discriminatees, further investigations, reports submitted to us by the Social Security Administration, and other sources, we have determined the amounts of money actually earned by the discriminatees in other employment during the backpay period and the amounts of expenses they incurred seeking and holding such employment during the backpay period. The relevant earnings of the discriminatees have been reduced in the computation by the amount of their relevant expenses. The resulting sum was subtracted from the amount of money each of the discriminatees would have earned at [name of company] had they not been [discharged, etc.]. The remaining amount is the backpay due each of the discriminatees by your [firm, organization, etc.].

The amount of money the discriminatees would have earned at your company during the backpay period, i.e., from [January 1, 19xx, through July 31, 19yy], was computed on the following basis: [Insert description of gross backpay computation as per following sample.]

> All were testers in the testing department prior to the discrimination and each was paid $1 an hour. An appropriate measure of the hours each of them would have worked is the average hours worked by all testers who remained in the employ of the company during the backpay period, excepting employees who worked less than 24 hours a week in any given week. The average hours worked by such employees are set forth in the attached tabulation entitled "Average Hours Worked By Testers, _____ Compa-

nv. From January 1, 19xx, through July 31, 19yy." We have noted that during the backpay period the company gave three general wage increases to the testers as follows:

April 1, 19xx	5 cents
August 6, 19xx	10 cents
July 1, 19yy	5 cents

Each tester was entitled to a $50 vacation week in July of each year and a Christmas bonus of $25 in December of each year. Gross backpay was computed by calendar quarters and consists, for each discriminatee, of rate of pay, as changed by the pay increases noted above, multiplied by the average hours shown on the attached table. Vacation pay and bonuses were added. Earnings from interim employment reduced by expenses were deducted to reach the net backpay due.

The entire computation of net backpay due each of the discriminatees is set forth in Appendix A attached hereto.

The total amount of backpay due each of the discriminatees is as follows: [List names of discriminatees and total amount of backpay due each.] To these figures there should be added interest computed in the manner required by the Board, on which we will be glad to give you further information and assistance.

Please send checks to this office for the amounts indicated above, and interest thereon computed in the manner required by the Board, less the taxes usually withheld from your employees' earnings for transmittal by you to the fiscal authorities. These taxes do not apply to the interest that is due. The payment of these amounts and your share of taxes as employer will be deemed full compliance with the backpay provisions of the [Board's order, court judgment] subject to the approval of the General Counsel.

If you have any questions or, if for any reason, you wish to discuss this computation, may I suggest that we meet in my office on [set a date and time]. If this is inconvenient, kindly telephone me so that other arrangements can be made.

Very truly yours,

Regional Director

Except where contempt proceedings are contemplated at the time of writing, the letter may be signed by the compliance officer.

[*All the above except paragraph 1 may be omitted except when contempt proceedings are in contemplation. If contempt proceedings are in contemplation at the time of writing, it is appropriate to include paragraph 2 and/or 3 in the letter to forestall a possible claim that the respondent did not understand the basis of the claim against it.*]

10626.1 *Followup by Compliance Officer:* Following transmittal of this letter, the compliance officer should orally inform the respondent that there is a requirement to close the case expeditiously or to recommend further legal action and that its prompt consideration of the letter would avoid the necessity for such litigation.

10628–10638 *Settlement of Backpay Cases*

10628 *Generally:* Settlement negotiations conducted by the Regional Office concerning the amount of backpay due under an administrative law judge's decision or Board order are normally not binding on the Board and do not bar the Board's determination of the backpay obligation.[1] The Board has delegated to the General Counsel authority to conclude binding settlements on backpay where high standards are observed. Such authority is normally exercised only by the Division of Operations Management. However, where the standards set forth in section 10629 are met, Regional Directors are, under extension of the delegation noted above, authorized to conclude settlements on backpay in the name of the Board. In all backpay cases in which settlements do not meet such standards, clearance should be obtained through the Division of Operations Management *before* backpay is obtained from, or before agreed to with, the respondent or disbursed to discriminatees. Note: This section and section 10629 do not apply to compliance with formal or informal settlements that absent clearance should be complied with in full, set aside, or recommended for contempt proceedings.

10628.1 *Resolving Differences Concerning Backpay:* Without good cause to do so, the backpay claim of a discriminatee is not something that properly can be given away in whole or in part.

Although the avoidance of litigation is a *desideratum* assiduously to be pursued, the universal appeal of settlements is that not only the discriminatee but all parties, including the respondent, gain therefrom. Hence, the possibility of settlement does not constitute cause for unwarranted or undeserved concessions not justified by the facts and the law after the case has been litigated and established on the merits. Rather, the concept of settlement constitutes recognition of the fact that, in some cases, there are reasonable differences about the amount due when comparing the maximum, which may with fair bona fide argument be claimed for the discriminatee, and the minimum, which may in good faith be fairly argued for the respondent.

The Regions are to seek to obtain 100 percent of the amount of the net backpay claimed in the backpay specification or which would be

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[1] E.g., *NLRB v. Armstrong Tire Co.*, 263 F.2d 680, 681–682 (5th Cir. 1959), enfg. in part 119 NLRB 353, 354–356 (1957); *Decker Truck Lines*, 139 NLRB 65, 66 (1962), enfd. in relevant part 322 F.2d 238, 243–245 (8th Cir. 1963); *Lipman Bros.*, 164 NLRB 850, 855 (1967).

claimed if a specification were to issue. Obtaining 100 percent of this amount rather than some lesser amount is the standard by which the Regions are to be guided.

Before a Region accepts a settlement that constitutes less than 80 percent of the net backpay claimed in the specification or that would be claimed if a specification were to issue, clearance must be obtained from the Division of Operations Management. By requiring such clearance it should not be inferred that settlements that constitute more than 80 percent but less than 100 percent of that claimed in the backpay specification may be routinely accepted. Rather, as indicated, *all* settlements must be justified by the relevant facts and law. The 80-percent figure referred to herein constitutes nothing more than a trigger for Washington clearance and should not be construed as authorizing settlements for less than 100 percent without good cause. In this regard claims of willful loss, except where a discriminatee has *clearly* been removed (whether voluntary or involuntary) from the job market, should not be conceded without Washington clearance (see sec. 10622).

Should the settlement be 80 percent or more of the net backpay claimed in the specification or which would have been claimed if the specification had issued, but be less than 100 percent of such claim (i.e., involve more than minor concessions), the closing case report (a copy of which should be forwarded to the Region's assistant general counsel) should set forth in addition the amount actually collected, the amount of the net backpay claim, and why it was not achieved (i.e., what allowances were made, how much did each allowance or group of allowances involve, the nature of the respondent's argument or justification and supporting facts, and why each allowance was granted to the extent it was).

10628.2 *Analysis of Respondent's Position on Issues Affecting Backpay; Contempt Considerations; Submission of Reinstatement Issues for Contempt:* For cases involving an assertion of inability to pay, see sections 10509 and 10510. In most instances when a controversy exists concerning the amount of backpay due and the matter cannot be resolved or the respondent refuses to pay the amount of backpay due as determined initially by the Region, the Region should proceed to a backpay hearing to resolve the factual and legal issues underlying the controversy (sec. 10650). However, in conducting its backpay investigation, the Region should consider whether or not the respondent's refusal to comply may constitute contempt of the Board's order, as en-

forced. Thus, when the amount of backpay is clear cut and there is no legitimate "controversy" that can be raised concerning the amounts due, the Region should submit its recommendation whether or not the respondent's refusal to pay the backpay constitutes contumacious conduct to the Contempt Litigation Branch, with a copy to the Division of Operations Management. (See sec. 10510.3(d).) Examples of backpay amounts when it could be argued that no legitimate controversy exists include the following: (a) when the employment relationship has not been severed and the backpay consists of the difference between the discriminatory pay rate and the nondiscriminatory rate or contractual rate, or (b) when the backpay consists of undisputed benefit contributions based on hours worked as reflected in the respondent's payroll records.

In those cases when the controversy involves a reinstatement issue, the Region should submit the matter to the Contempt Litigation Branch with a recommendation whether or not contempt proceedings are warranted to secure compliance with the Board's reinstatement order. The case should be submitted even when there appears to be a legitimate factual or legal controversy surrounding the reinstatement issue. The Region should defer issuance of a backpay specification until such time as the General Counsel has decided to recommend or the Board has decided whether or not to authorize contempt proceedings. (See sec. 10509.7.)

10629 *Standards for Settlements:* When *all* the criteria set forth below are met, Regional Directors are authorized, in the name of the Board, to accept settlements of backpay without prior clearance from the Division of Operations Management.

a. The backpay computation has been prepared on the basis of one of the several specific backpay theories deemed appropriate by the Regional Office.

b. All the parties, including the discriminatees, have expressed their affirmative agreement with the proposed settlement.

c. The respondent has not been found guilty of violations in prior cases and there are no other current charge cases on file that are not being included in the settlement.

d. The amount of backpay offered by the respondent conforms to section 10628.1 or has been cleared with the Division of Operations Management.

e. All discriminatees entitled to reinstatement offers have received such offers or have waived reinstatement. If a respondent makes an offer of more backpay moneys due, as an inducement to discriminatee to waive reinstatement, the Region should, of course, not accept such a settlement offer as the Act is remedial in nature rather than punitive.

f. All other compliance action such as posting of notices, collective bargaining, etc., both affirmative and negative, has been or will be fully carried out.

g. The Regional Director believes the settlement fully effectuates the purposes of the Act.

It is assumed that the Regions will continue their practice, in computing net backpay, of refraining from resolving borderline willful idleness contentions against the discriminatees. When questions arise concerning judgments on this issue, the Regions should not hesitate to submit the case to Division of Operations Management for approval even if the other criteria set forth herein have been met.

If all such criteria have not been met, clearance from the Division of Operations Management must be secured before accepting or disbursing backpay.

In emergencies clearance may be obtained by telephone from the appropriate assistant general counsel. However, whether requests for clearance be made by memorandum or by telephone, the Region should state the full amount of backpay, the amount to be paid under the settlement, the respondent's reasoning in support of the proposed settlement, the position and reasoning of any opposing charging party or discriminatee, and the Region's recommendations and reasoning for accepting or rejecting the proposal.

This section does not apply to formal or informal settlements of a charge (sec. 10628).

10630 *Settlement Based on Preliminary Estimate:* The object of preparing a preliminary estimate of net backpay in accordance with the procedures set forth in section 10568 is to provide quickly a rational basis for a prompt lump sum settlement. Immediately on completion of the estimate, the respondent should be advised of the amount of backpay due and urged to settle the case on this basis. The savings from the avoidance of litigation and the relegation to the Board of problems of distribution and other administrative chores should be emphasized. It has been found helpful, toward the latter stages of a settlement conference, to bring the respondent in to discuss with the Regional Director a last effort at agreement.

During periods of delay, such as waiting for a conference date, or to enable the respondent's consultation with counsel, the preparation of comprehensive computation of net backpay must go forward as though no settlement were possible. The respondent should be notified that this is being done and that the compliance officer is permitted to abandon efforts to complete the computation only upon settlement of the case. The respondent should be notified that any offers the Regional Office may make toward lump sum settlement may be withdrawn upon completion of the comprehensive computation.

10631 *Installment Payments:* Installment payments of backpay, fees reimbursement, etc., may be permitted when the respondent has demonstrated to the satisfaction of the Regional Director that its financial position would be seriously jeopardized by full payment of the obligation. Normally, to satisfy themselves about this, compliance officers should review the respondent's financial records or insist upon reviewing recent financial statements prepared by a certified public accountant.

When the amount of backpay is large, the Region may consider whether it is feasible to retain duly accredited certified public accountants to examine the respondent's books and records and prepare payment proposals in accordance with the results. This may be essential if the Region has reason to believe that assets have been, or are being, siphoned off, that all income is not being recorded, etc., so that contempt proceedings may be warranted. In most situations when an ability-to-pay question exists, statements prepared by an internal accounting staff or nonaccredited independent accountants are not to be relied on without verification. Clearance from the Division of Operations Man-

agement is required before undertaking to retain expert accounting services if it is contemplated the Agency will share or bear the expense.

In all arrangements under which the backpay is to be paid in installments, in addition to the usual days of grace and standard acceleration clause in the event of a default, the Region should try to obtain such security provisions as are commonly required by creditors in ordinary business and financial transactions for protection against default and the possibilities of insolvency, bankruptcy, reorganization, etc. Thus, when a closed corporation is involved, it may be advisable to require the principal shareholder to guarantee payment since this is commonly required in the business world.

When the amount agreed to be paid is less than the full amount computed due by the Region, the stipulation should state, and the respondent should agree to pay, the full amount computed, but with a proviso that, on payment of all the installments as scheduled except the last, the last installment (for the balance of full backpay) is waived. Settlements providing for installment payments should provide for the payment of interest during the installment payment period.

10632 *Procedures Following Completion of Comprehensive Net Backpay Computation*

10632.1 *Court Judgment Cases*

a. *Field Attorney Assigned:* If the Region deems it advisable, when a comprehensive computation is completed, and there is a probability that further legal action will be necessary, a field attorney should be assigned to the case, preferably the attorney who tried the initial unfair labor practice case, to provide legal advice to the compliance officer. This need not be done if full compliance is forthcoming. The compliance officer should prepare the computation in the same form in which it will appear in any future backpay specification and, in cooperation with the field attorney, should prepare and send a letter to the respondent explaining the basis for the computation, requesting payment of the amount found due in the computation, and suggesting a conference. (See sec. 10626 for pattern.)

b. *Conference:* At such conference, the contentions of the respondent should be carefully assessed and when they have merit should form

the basis of concessions. There is rarely a unique approach to accurate backpay computations and reasonable points made by the respondents should be considered in reaching agreement on amounts due. Even though settlement is not possible, the computation should be adjusted to meet valid points made by the respondent.

c. *Backpay Specification:* Preparation of the backpay specification should not await the outcome of settlement conferences but must be initiated and carried forward on the expiration of the 80-day period following entry of a court judgment. If it is in process or is completed at the time of the conference, the respondent should be advised of this fact.

A series of conferences should be avoided. If settlement is not reached although a backpay specification has been prepared, service of the specification should not be delayed for further conferences. Such conferences may be held after the specification has been served.

10632.2 *Voluntary Compliance Cases (Prior to Court Judgment or Decree):* A field attorney need not be assigned at these stages nor need the compliance officer conduct compliance negotiations in writing. In view of the fact that failure to obtain compliance will result in recommendations for Board order or enforcement, the same degree of precision in negotiations as in court judgment cases need not necessarily be exercised. Every effort should be made to reach a settlement, however, within the time limits provided.

10634 *Permitting Respondent To Question Discriminatees:* The respondent's counsel may request as a prerequisite to agreeing to a settlement that the Regional Office make discriminatees available to counsel for questioning concerning their interim earnings and search for work. This should not be agreed to. There can be no deviation from this rule unless prior authorization is received from the Division of Operations Management. This type of investigation is extremely demoralizing to the discriminatee and is better and more fairly conducted under the judicial safeguards of a hearing.

10636 *Joint and Several Liability:* When the backpay liability of a respondent employer and a respondent union in a companion CA–CB case is joint and several, all reasonable measures should be taken by

the compliance officer to assure that the liability is in fact borne equally by the employer and the union.

However, when the joint and several liability of an employer and union refers solely to a dues reimbursement remedy and they agree that the union alone shall make such reimbursement, no further efforts need be made to require equal apportionment of the liability in the absence of unusual circumstances such as domination of the union by the employer.

In cases when all respondents indicate a desire to comply with the backpay provisions of the remedy, each should pay its equal share. When one respondent is willing to comply by paying its proportionate share of the backpay, while the other respondent refuses to comply or insists on litigating the issues, the proffered compliance proposal should be accepted. The compliance proposal should be accepted, however, with the stipulation that, should efforts to collect the remaining backpay from the other respondent fail, the complying party will be considered liable for paying the remainder due. Further, it should be informed that, should backpay proceedings be instituted, it will be named as a party-respondent.

10636.1 *Departure From Equal-Proportions Basis.* When respondents have been found to be jointly and severally liable, one of the respondents may wish to comply by voluntary payment of the full amount. In view of the finding of joint and several liability, such offer *should not be solicited* until every effort has been made to collect a proportionate share from other respondents. The offer of one respondent to pay all shares of backpay *may be rejected* when this appears advisable, e.g., when the recalcitrant respondent has repeatedly in the past proved difficult in this connection and possible eventual collection therefrom would have an exemplary impact. The offer to pay voluntarily all shares of the backpay should be accepted only without prejudice to processing further in all other respects the case against other respondents and only with the clear understanding of the parties that full payment satisfies our make-whole requirements and forecloses us from later seeking a proportionate share from the other respondents.

In this connection, Board clearance, through the Division of Operations Management, is required for the proposed acceptance of backpay compliance (with an administrative law judge's decision, a Board order, or a court judgment) or of formal backpay settlement on other than a

proportionate basis. In all such cases, clearance requests must be accompanied by a history of efforts to collect backpay on an equal-proportions basis and by a statement of reasons warranting the departure from customary policy.

10636.2 *Respondents Insolvent:* When there are several respondents involved in a case and one or more becomes insolvent before paying its share, the unpaid amount should be solicited without delay from the other respondents.

10638 *Settlement After Backpay Specification and Notice of Hearing:* If settlement is reached by an agreement following the issuance of a backpay specification and notice of hearing, and all the criteria set forth in section 10629 are met, the Regional Director should withdraw the specification. Thereafter, the procedure described in section 10674 should be followed.

10640–10647 *Collection, Payment, Receipt, and Disbursement of Backpay*

10640 *Disbursement Procedures*

10640.1 *Procedure When Net Backpay Due Individual Discriminatees Is Determined:* Once net backpay due individual discriminatees has been determined, the respondent should be requested to deliver checks made out to individual discriminatees to the Regional Office for transmission to them. Prior to the making out of the checks, the respondent's attention may be directed to some of the problems with respect to tax deduction, which do not usually arise in the payment of wages to employees in the normal course of business. (See secs. 10648–10649.) The checks should then be delivered personally to identified claimants or mailed by certified mail, return receipt requested, to each discriminatee with a letter explaining the method of computation and any deductions for taxes. (See secs. 10648–10649.) The discriminatee should be referred to Internal Revenue Service for tax advice concerning the problems discussed in sections 10648.1, 10648.4, 10649.4, and 10649.6 and the possibility of spreading substantial backpay income over several tax years. Explanatory letters should also be sent discriminatees not entitled to backpay.

In no event should checks be made payable to Board employees, nor should bank accounts be opened in their names.

10640.2 *Procedure When Net Backpay Due Individual Discriminatees Is Not Determined:* Although payment is normally made as provided in section 10640.1, when a lump sum has been agreed on, and the amount due each individual discriminatee has not been determined at the time of the agreement, the following procedure for collection and disbursement may be used:

a. The settlement stipulation should provide for the deposit of the agreed lump sum in an "escrow" account in a local bank in the name of the respondent, but expendable only on order of the Regional Director. In the alternative, the respondent may present its check made payable to the National Labor Relations Board to the Region and it will be placed in escrow and then disbursed pursuant to the procedures in section 10648.5.

b. The compliance officer should determine the proportionate share due each discriminatee. (It is good practice then to secure agreement of the discriminatees or their representatives concerning these shares so that the Region can avoid a charge of being arbitrary.) In the event the amount due missing discriminatees cannot be determined subsequently, the procedure set forth in sections 10644, 10648.5, and 10649.5 should be followed.

c. On the basis of the compliance officer's apportionment, the respondent should submit a schedule of tax deductions to be made (see secs. 10648, 10649).

d. The Regional Director should provide the bank with a schedule of exact payments to be made, both to discriminatees and to other recipients. (If any sum is returned to the respondent for remission to the proper tax authorities, it should be instructed to notify the Region when and if the taxes are paid.)

e. In such circumstances, the procedure described in sections 10648.5 and 10649.5 with regard to withholding and FICA taxes should be followed.

10640.3 *Direct Distribution by Respondent:* Should the respondent prefer to make distribution directly, it may be permitted to do so on terms and conditions prescribed by the Region and it must provide the Regional Office with receipts or other suitable evidence of payment. Of course it is well established that respondents may not utilize a compromise or settlement agreement privately negotiated with a claimant (or even the compliance officer unless the requisite approval is obtained) to defeat a backpay claim.[1]

10640.4 *Other Methods of Payment:* Any other proposed method of payment not in accord with traditional or customary usage should be cleared by telephone or memorandum with the Division of Operations Management.

10640.5 *Payment to Discriminatees in Armed Forces or Otherwise Not Available To Receive Payment in Person:* Payment to persons such as discriminatees in the Armed Forces (as well as others to whom checks cannot be safely transmitted or readily redeemed) can be facilitated, and

[1] See sec. 10628, fn. 1.

the distribution of backpay completed without delay and resort to less efficient methods, by having such discriminatees execute powers of attorney, preferably in advance, designating representatives (usually close relatives) to accept payment in their behalf. (See sec. 10640.6 for pattern.) The power of attorney should be in duplicate and a copy of the power should be given to the Regional Office and kept in the case file. The backpay check should be payable to the discriminatee and not the "attorney" and the discriminatee should be warned that giving a power of attorney is like delivering cash, inasmuch as the discriminatee will have little or no recourse if the "attorney" absconds or embezzles. The discriminatee can strike paragraph (b) and then the attorney could do little more than hold the check for safekeeping or deposit it in the discriminatee's bank account.

Because of the circumstances under which a power of attorney to collect backpay may be executed, and to avoid later contests over its validity, the power referred to in this section should be acknowledged. By acknowledgment is meant a formal declaration by the person executing the power before a proper official that the instrument is the former's act. Section 10640.6 provides alternate forms of acknowledgment, the first being generally appropriate and the alternate form being appropriate only for persons in the military.

10640.6 *Power of Attorney Form:* Set forth below is an appropriate power of attorney form to be used as provided in section 10640.5.

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, _____, now serving in[1] * the [2] * _____, whose Serial Number is * _____, and whose Social Security Number is _____, and whose permanent address is _____, in _____, in the State of _____, do hereby constitute and appoint _____, residing at _____, in _____, in the State of _____, as my lawful attorney to act on my behalf for the following purposes:

[1] Or, where not yet in the Armed Forces, substitute expecting to serve in.

* Omit where not yet in the Armed Forces. This and the preceding items would be omitted and the description tailored to fit the situation, for example, of a civilian employed by Brown & Root overseas, of a person who is in an institution, etc.

[2] Insert branch of the Armed Forces, as Army of the United States, Marine Corps, etc.

(a) To collect and receive all sums of money as are or may hereafter become due and payable to me under an award of backpay made or to be made by the National Labor Relations Board pursuant to the National Labor Relations Act under a certain case now pending before it; and to issue receipts therefor; and

(b) To endorse any checks or negotiable instruments and to make, execute, and deliver all receipts and any other documents that may be necessary or proper to collect and receive the above sums of money.

And, I, _____, give to _____ _____, as my attorney, full power and authority to do and perform all acts and things required and necessary to be done for the above purposes as fully as I could do if I were personally present at the doing thereof, and I hereby ratify and confirm all that my attorney may or shall lawfully do or cause to be done by virtue of this power of attorney.

IN WITNESS WHEREOF, I have set my hand and seal this _____ day of _____, 19xx, at _____, in the State of _____.[3]

_____(L.S.)
Signature of Claimant

Acknowledgment

STATE OF _____
COUNTY OF _____

I, the undersigned, do hereby certify that I am a duly commissioned, qualified, and authorized notary public in and for the STATE OF _____; and that the grantor in the foregoing Power of Attorney, who is personally well known to me, appeared before me this day within the territorial limits of my authority and executed said instrument and acknowledged that the execution of said instrument by (him or her) was (his or her) free and voluntary act and deed for the uses and purposes therein set forth.

[3] This item would be tailored to fit the actual situation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this _____ day of _____, nineteen hundred and seventy _____.

_____
Notary Public
My Commission Expires _____

Alternate Acknowledgment[4]

In the _____ [Army, Navy, etc.] of the United States at _____.

I, _____, the undersigned officer, do hereby certify that on this _____ day of _____, 19xx, before me personally appeared _____, Serial Number _____, whose home address is _____ and who is known to me to be a _____ in the _____ [insert Branch of the Armed Forces] of the United States, and to be the identical person who is described in, whose name is subscribed to, and who signed and executed the foregoing instrument, and (he or she) personally acknowledged to me that (he or she) signed and sealed the same, on the date it bears, as (his or her) true, free, and voluntary act and deed, for uses, purposes, and considerations therein set forth, and I, the undersigned, do further certify that I am at the date of this certificate a commissioned officer of the grade, branch of service, organization and official capacity stated below in the active service of the _____ [insert Branch of the Armed Forces] of the United States.

(Signature) _____
Name (Printed) _____
(Grade and Branch) _____
(Organization) _____
(Capacity in Which Acting) _____
(Home Address) _____

[4] The Armed Forces alternative acknowledgment to be executed by a commissioned officer may be used if a notary is unavailable provided such an acknowledgment is recognized by local state law (which it almost universally is) where military personnel are involved. When it is not known whether a notary will be available, both forms can be attached to the Power of Attorney and the Acknowledging Officer can utilize whichever form may be appropriate.

10641 *Accounting Assistance:* When the amount of backpay is large and backpay installment payments are under consideration, when inability to pay has been asserted (sec. 10631), or when the Region has reason to believe that assets have been or will be siphoned off (sec. 10643), the Region may consider whether it is feasible to retain a duly credited certified public accountant to examine the respondent's books and records and prepare an analysis of the results. In the event that the Region determines that outside CPA assistance is warranted, clearance from the Division of Operations Management is required in those cases when the Agency will share or bear the expense of retaining expert accounting services (sec. 10631).

10642 *Respondent in Bankruptcy:* The Board has been held to be a "creditor" with respect to backpay awards under the Bankruptcy Act (the Act).[1] The same rule applies under the Bankruptcy Code (the Code), as amended in 1984, which became effective October 1, 1979, and replaced the Act for all bankruptcy cases commenced on or after this date.[2] It has also been recognized that the Board is the only entity chosen by Congress to enforce the NLRA,[3] and that the NLRA creates no private rights of action;[4] the Board is thus the only possible creditor for its backpay claim.

Under the Code, the Board also remains the sole authority to liquidate its backpay award.[5] The Bankruptcy Court, however, may estimate any unliquidated Board claim, pursuant to a hearing, if waiting for the Board's backpay adjudication would "unduly delay the administration of the case" (11 U.S.C. 502(c)(1)).

10642.1 *Types and Priorities of Board Claims:* There are four categories of claims for backpay and other monetary remedies allowed under the Bankruptcy Code, and the proof of claim must specifically reflect the amount attributable to each.

a. *First Priority:* For backpay that accrues subsequent to the filing of the bankruptcy petition, the claim is an administrative expense (11

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[1] *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952), and *NLRB v. Killoren*, 122 F.2d 609, 613 (8th Cir. 1941).

[2] *In re Missionary Baptist Foundation of America, Inc. v. Brooks Supermarket, Inc.*, 667 F.2d 1244, 1245 (5th Cir. 1982).

[3] *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 265 (1940); *Nathanson v. NLRB*, supra; *In the Matter of Nicholas, Inc.*, 55 B.R. 212, 215 (Bankr. N.J. 1985); *In re Adams Delivery Service*, Bkrtcy. App., 24 B.R. 589, 592 (9th Cir. 1982); *In re Brada Miller Freight Systems, Inc.*, D.C., 16 B.R. 1002, 1008 (N.D. Ala. 1981).

[4] See fn. 3.

[5] *Nathanson v. NLRB*, supra; *In re Bel Air Chateau Hospital, Inc.*, 106 LRRM 2834, 2835 (C.D. Cal. 1980).

U.S.C. § 503(b)(1)(A))[6] and entitled to a first priority (11 U.S.C. § 507(a)(1)).[7]

b. *Second Priority:* In involuntary bankruptcy cases, a second priority is given to backpay accruing between the filing of the petition and the earlier of two events: the appointment of a trustee or the issuance of an order of relief (11 U.S.C. § 507(a)(2)).

c. *Third Priority:* Backpay representing wages (excluding employee benefit plans), which accrues within 90 days prior to the filing of the bankruptcy petition or the date that the debtor ceases operations, whichever occurs first, up to a maximum of $2000 for each employee, is entitled to a third priority (11 U.S.C. § 507(a)(3)).

d. *Fourth Priority:* Backpay representing contributions to employee benefit plans, which accrues within 180 days prior to the filing of the bankruptcy petition or the date that the debtor ceases operation, whichever occurs first, and which added to the third priority does not exceed $2000 for each employee, is entitled to a fourth priority (11 U.S.C. § 507(a)(4)). When more than one benefit plan is involved, and the total of all the benefit plans' claims exceeds the limit of the $2000 (including the 90-day wage priority), then distribution of the priority will have to be made to the competing plans so as not to exceed the limit. At the time the proof of claim is filed, it may not be possible to determine the share each plan is to receive under the fourth priority. Thus, the demand for priority should state "to the extent allowable under 11 U.S.C. 507(a)(4)." When determined, the proof of claim should be amended to reflect the share each fund is entitled to under the fourth priority.

e. *General Unsecured Claims:* Backpay representing wages for the period more than 90 days prepetition, and backpay representing contributions to employee benefit plans more than 180 days prepetition and any amounts in excess of the $2000 limit (for 90-day wage plus the 180-day benefit priorities) are general unsecured claims.

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[6] *In re Bel Air Chateau Hospital, Inc.*, 106 LRRM 2834, 2835 (C.D. Cal. 1980); *Durand v. NLRB*, 296 F.Supp. 1049, 1057 (W.D. Ark. 1969).

[7] 11 U.S.C. § 1129(a)(9) provides that in Chapter 11 reorganizations, administrative expenses must be paid in full, in cash, on the date of the confirmation of the plan unless the holder of the claim has agreed to defer payment.

10642.2 *Determination of the Backpay Period and Calculation of Interest:* The backpay period is generally controlled by the NLRA and the filing of the petition does *not* toll the backpay period. Bankruptcy law, however, controls the distribution of interest.

In both Chapter 7 and Chapter 11 cases, prepetition interest on a backpay award is allowed. The Region should set forth the interest separately claiming the same priority as the underlying backpay to which the interest is attributable.

In Chapter 7 cases, postpetition interest is distributed from the assets of the estate, only just before the distribution of remaining funds paid back to the debtor (11 U.S.C. § 726(a)(5)). In Chapter 11 liquidation cases, case law has held that postpetition accrued interest is also to be paid to unsecured creditors before any proceeds are returned to the debtor.[8]

10642.3 *Filing Proofs of Claims:* Proofs of claims must conform to the requirements of Rule 3001 and, if based on a Board decision and order, Board supplemental decision, and/or court of appeals judgment, they must be attached (Rule 3001(c)). If no Board order or court judgment has issued, the Region should attach copies of the most recent formal documents, such as a complaint or administrative law judge's decision.

a. *Chapter 7 and Chapter 13 Cases:* In Chapter 7 (liquidation) or Chapter 13 (individual debt adjustment) cases, claims must be filed within 90 days after the date set for the first creditors' meeting (Rule 3002(c)).

   In some cases, the court will send a notice pursuant to Rule 2002(e) that the Board does not have to file a proof of claim because there are no apparent assets in the estate. If the Board subsequently receives a notice from the Bankruptcy Court that the case has become an asset case, the Board must file a claim within 90 days after the *clerk has mailed* the notice that the case has become an asset case (Rule 3002(c)(5)).

b. *Chapter 11 Cases:* In Chapter 11 (reorganization) cases, the Board must file a proof of claim if its claim is not listed in the debtor's

[8] *In re Shaffer Furniture Co.*, 68 B.R. 827 (Bkrtcy. E.D. Pa. 1987).

petition, or if it is scheduled but is inaccurate or listed as disputed, contingent, or unliquidated (Rules 3003(b)(1) and (c)(2)).

In Chapter 11 cases, the time for filing the proof of claim is set by the Bankruptcy Court, which may be extended when cause is shown (Rule 3003(c)(3)).

c. *Conversion to Chapter 7:* When a case is converted to a Chapter 7 case, the time period found in section 10642.3(a) above begins anew, except in cases of reconverted Chapter 7 cases when the original 90-day period has expired (Rule 1019(3)).

After such a conversion to Chapter 7, claims that are filed by the Board in the superseded case are also considered filed for the Chapter 7 case (Rule 1019(4)). If the backpay is still accruing after the conversion or begins accruing after the case is converted, and if the Board is listed on the new schedule of unpaid debts, the Board must file a claim covering the postconversion period 60 days from the entry of the Bankruptcy Court's notice of order of conversion (Rule 1019(7)). The court shall fix the time for filing postconversion unscheduled debts and debts arising from a collective-bargaining agreement (Rule 1019(7)).

10642.4 *Allowance of Claims:* Once a proof of claim is filed, the Board's claim is allowed unless an objection to it is filed (11 U.S.C. § 502(a)).

Any party in interest may object to the Board's claim, which must be mailed to the Board 30 days prior to the hearing on the objection (Rule 3007). A reply to the objection must be in Bankruptcy Court 5 days (excluding weekends) prior to the hearing. The Region should notify Special Litigation immediately on receipt of an objection to the Board's claim.

10642.5 *Rejection of Collective-Bargaining Agreements:* The Supreme Court held in *Bildisco*[9] that collective-bargaining agreements are executory contracts covered by the Code, and that bankruptcy judges should permit an employer to reject a union contract on a showing that the agreement "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." In a Chapter

[9] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Any petitions to reject a collective-bargaining agreement filed in any bankruptcy case filed prior to July 10, 1984, are controlled by *Bildisco*.

11 reorganization proceeding, the Court held that an employer does not violate Section 8(a)(5) when it files its voluntary bankruptcy petition and unilaterally cancels its obligations under the collective-bargaining agreement.

Subsequent to the *Bildisco* decision, on July 10, 1984, the Bankruptcy Code was amended to supersede the *Bildisco* reasoning. In all bankruptcy cases commenced on or after July 10, 1984, the debtor-in-possession or the trustee must make a proposal to the union of the modifications "necessary" to permit reorganization and must provide information necessary to evaluate the proposal (11 U.S.C. § 1113(b)(1)).

In cases controlled by section 1113, the collective-bargaining agreement continues in effect until the court approves the application for rejection (11 U.S.C. § 1113(f)). However, after a hearing, the court may order interim changes in the collective-bargaining agreement prior to its decision on the application for rejection if the court finds that such changes are "essential to the continuation of the debtor's business or in order to avoid irreparable damage to the estate" (11 U.S.C. § 1113(e)).[10]

In Chapter 7 cases, contracts not assumed by the trustee within 60 days after the order for relief (or within such additional time as the court, for good cause, may allow) are deemed rejected (11 U.S.C. § 365(d)(1)).

10642.6 *Regional Office Procedures in Bankruptcy Cases:*

a. *Liquidation and Reorganization Proceedings:*

1. Unless expressly enjoined, the Region should proceed expeditiously with the unfair labor practice case(s) notwithstanding contentions that Board proceedings are automatically stayed under section 362 of the Code or may be stayed under the discretionary provisions of section 105 of the Code. The Region should notify Special Litigation immediately concerning any effort to have Board proceedings enjoined.

[10] Neither *Bildisco* nor 11 U.S.C. § 1113(b) permits the debtor-in-possession or the trustee to refuse to recognize or bargain with the Union, and failure to do so can be found to be a violation of Sec. 8(a)(5).

2. The Region should file a Request for Notice of All Proceedings under Rule 2002 and a Request for a Disclosure Statement and Plan of Reorganization under Rule 3017(a).

3. The Region should file in bankruptcy court a notice of the pendency of the unfair labor practice proceeding, together with a copy of the complaint and, if issued, the administrative law judge's decision, Board order, and court of appeals' judgment. The certificates of service should reflect that the notice has been sent to the trustee and all potential purchasers of the business of which the Region is aware. The trustee should be served with copies of all formal documents in the unfair labor practice action.

4. Any unfair labor practice or supplemental proceeding should be set for the earliest possible date and the chief administrative law judge advised of the pending bankruptcy proceedings.

5. Generally, proofs of claim should be filed as soon as possible. The claim should be filed after the Region has determined that the charge is meritorious. When, however, the time for filing the claim may expire before the determination of the merits of the charge, a proof of claim should be filed within the time allowed under the appropriate limitations provision set forth in section 10642.3, above, attaching a copy of the charge. Where interim earnings are unknown or calculation would cause undue delay, the claim may be filed without interim earnings and amended at a later date.

6. The Region should notify Special Litigation immediately on notice of an objection to the Board's proof of claim. Forward copies of the claim, the objection, and papers supporting the claim to Special Litigation as soon as possible. See section 10642.4, above.

7. Backpay specifications should be drafted with sufficient detail to enable the administrative law judge and the Board to particularize the award in a manner that allows for the claiming of the various priorities set forth above. The periods that must be particularized are: (a) claims accruing during the period *more* than 180 days prior to the earlier of the filing of the petition or the date the debtor ceased doing business; (b) the 180-day period prior to the earlier of the filing of the petition or the cessation of business; (c) the 90 days preceding the earlier of the filing of the petition or the cessation of business; (d) the period between the filing of an involuntary petition and the earlier of the appointment of a trustee or the entry of the order for relief (see 11 U.S.C. § 502(f)); and (e) the time that the business was operated while in bankruptcy.

8. When the dismissal of a charge involving a bankruptcy proceeding is appealed, the Region should telephonically request the Director of the Office of Appeals to expedite the appeal process. If it is impossible for the appeal to be decided within the period allowed for the filing of proofs of claims, the Region should file a protective proof of claim.

9. Special Litigation should be notified immediately of any proposal to sell the debtor's assets "free and clear" of encumbrances.[11]

10. *Cases Involving Discharge in Bankruptcy: Submissions to Advice or Special Litigation:* Special consideration should be given to those cases when a complaint will issue or has issued against an individual or corporation that has been granted a discharge by the bankruptcy court, or against a corporation or partnership that is owned or operated by an individual or corporation that has been discharged in bankruptcy. In such cases, the Region should consider the following factors:

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[11] See *International Technical Products Corp.*, 249 NLRB 1301 (1980).

(a) The Bankruptcy Code voids any judgment and enjoins the enforcement of any judgment on a debt that has been discharged (11 U.S.C. § 524(a)(1) and (2)). But only debts of individuals (11 U.S.C. § 727(a)(1)) and debts of reorganized entities after confirmation of a plan (11 U.S.C. § 1141(c)) are dischargeable.

(b) Individuals are discharged from all monetary prepetition debts (11 U.S.C. § 727(a)(1)). Thus, the Board cannot seek to hold such individuals liable for prepetition monetary obligations arising out of unfair labor practices. The pursuit of these prepetition monetary obligations through the issuance of a complaint, compliance, or any other proceedings may result in the Board being held in contempt of court.

(c) Because corporations and partnerships are not discharged through Chapter 11 liquidations or Chapter 7, there is no prohibition against issuing or prosecuting a complaint that seeks to hold these entities liable for prepetition obligations.

(d) *Clearance Required:* Cases when the Region is considering issuing complaint against a discharged individual or entity should be submitted to the Division of Advice. When complaint has already issued, the case should be submitted to Special Litigation. Copies of all submissions should be sent to the Division of Operations Management.

b. *Liquidation Proceedings Only:* The Region should evaluate the case to determine whether it will effectuate the Act to proceed. Although the decision must be made on a case-by-case basis, the following should be considered: (1) whether there is any real possibility that the debtor will resume operations or that a successor will take over the business and (2) if not, whether the schedules of the debtor's assets and liabilities indicate that the Board could recover more than a token amount on behalf of individual discriminatees. The Region should notify the Division of Operations Management of those cases when, in the Region's view, it would not effectuate the Act to proceed.

10642.7 *Enforcement Issues:* In any case where the respondent in an unfair labor practice proceeding has filed a bankruptcy petition prior to, or on the issuance of, the Board's order, the Region should

initiate supplemental backpay proceedings following issuance of the Board order without awaiting enforcement.

Ordinarily a case should not be referred for enforcement unless there is an objective basis for believing that the business will continue or be resumed. When the Regional Director is of the opinion that a liquidation case should be referred for enforcement, the case should first be submitted to the Division of Operations Management for such approval.

10642.8 *Review of the Proposed Plan of Reorganization:* In a Chapter 11 case, on the receipt of any proposed plan of reorganization, the Region should promptly determine if the Board's claim is impaired under 11 U.S.C. § 1124. Generally, a claim will be impaired if, under the plan, the claim is not to be paid in full. Consideration should be given as to whether to file an objection to the plan. If it is unclear from the plan whether the Board's claim is impaired, or if it is unclear from the Disclosure Statement (see sec. 10642.7(a)(2), above) whether the plan is feasible, the Region should contact Special Litigation.

10642.9 *Special Litigation; Clearance:* In addition to the situations noted above, the Region should also submit to Special Litigation any bankruptcy cases involving adversary proceedings or novel or complex issues. The Region should also seek clearance from Special Litigation before approving a withdrawal request or settlement agreement in those cases when such approval would affect the Board's position in pending bankruptcy proceedings.

10643 *Protection From Sale, Transfer, Dissipation, or Fraudulent Conveyance of Respondent's Assets:* When financial liability is asserted and there is reason to believe the respondent's ability to pay may become impaired for any cause, steps should be taken to protect the Agency's claim. These steps include the following:

10643.1 *Injunctive Relief; Protective Restraining Orders:* Following a determination to issue a complaint and periodically thereafter, the Region should assess the likelihood of the respondent's rendering itself or otherwise becoming incapable of complying with the monetary provisions of an eventual Board order or court judgment (see sec. 10505). The respondent's financial condition should be closely monitored, particularly in those cases involving previous resort to use of alter egos or other manipulations of corporate form to evade liability; cases involving a number of closely held corporations controlled by the same party;

or cases involving threats to "close its doors" in response to investigative inquiries or litigation. When it appears that a respondent may be in the process of rendering itself incapable of complying with the monetary provisions of an existing or potential Board order or court judgment, or is otherwise attempting to render such provisions ineffective, the Region should recommend that injunctive relief be sought against such conduct pursuant to Section 10(e) or (j) of the Act. The following factors should be considered.

a. *Availability of Relief.* Injunctive relief against dissipation of assets or similar conduct is available at any stage of a case following issuance of an unfair labor practice complaint. Generally, relief is appropriately sought under Section 10(j) from issuance of a complaint to issuance of a Board order; thereafter, relief is appropriately sought under Section 10(e).[1] Depending on circumstances, available relief includes "asset freezes," limiting the use of the respondent's assets to specified purposes,[2] injunctions against specific transactions or types of transactions, as well as other, less intrusive, forms of relief such as monitoring and reporting requirements.[3]

b. *Criteria for Seeking Injunctive Relief; Consideration of Alternative Strategies for Protecting Claims.* Generally, whenever there exists reasonable cause to believe that a respondent is attempting to evade existing or potential backpay liability, and injunctive relief would preserve the status quo and permit effectuation of meaningful relief, it would be appropriate to recommend that injunctive relief be sought.[4] Examples of appropriate circumstances for seeking relief would include: sales, auctions, closings, foreclosures, or liquidations of a respondent's business that are undertaken without provision for satisfying potential monetary liability; actual or potential distributions of the respondent's assets to its principals or insiders; asset transactions between a respondent and affiliated busi-

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[1] *Maram v. Ille Arcobi Corp.*, 110 LRRM 2495 (D.P.R. 1982) (10(j)); *NLRB v. Kaiser Mfg. Co.*, 149 F.2d 686 (2d Cir. 1945) (10(e)).

[2] "Asset freezers" are typically tailored to minimize interference with a respondent's legitimate operations, and generally permit unfettered use of assets once the respondent provides security, usually in the form of a bond or escrow account, for its unpaid or potential liability. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *Investment Control Corp. v. Ryan*, 488 F.2d 1334, 1393 (2d Cir. 1974), cert. denied 417 U.S. 932 (1974); *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1106 (2d Cir. 1972).

[3] The scope of Federal courts' injunctive powers under statutory provisions that, like Sec. 10(e) and (j) of the Act, contain a general grant of equity powers to aid of a Federal regulatory scheme is discussed in *Mitchell v. DeMario Jewelry Co.*, 361 U.S. 288, 291-292 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-398 (1946); and *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287-290 (1940).

[4] *Eisenberg v. Wellington Hall Nursing Home*, 651 F.2d 902, 905-907 (3d Cir. 1981) (10(j)); *Auto Workers (Ex-Cell-O Corp.) v. NLRB*, 449 F.2d 1046, 1050-1051 (D.C. Cir. 1971) (10(e)).

nesses or relatives, friends or close business associates of the respondent's officers or principals; and any case in which the circumstances suggest the possibility of fraud or deliberate measures designed to render a respondent judgment proof, or unable to comply.

Injunctive relief generally is either inappropriate or of limited utility in cases involving assets already in custodia legis (in the control of the court) such as probate or receivership cases. In addition, injunctive relief not ancillary to contempt is also inappropriate in cases where the respondent's assets have already "disappeared." In these latter circumstances, the Region should consider the potential effectiveness of either contempt, administrative, or supplementary collection proceedings against non-bona-fide transferees.[5]

Special considerations apply in bankruptcy because of the "automatic stay" provisions of the Bankruptcy Code (11 U.S.C. § 362). Nonbankruptcy injunctive relief relating to a bankrupt respondent's assets is generally inappropriate because of the stay. However, at least in cases when ongoing financial misconduct of a debtor's management threatens to frustrate compliance, injunctive relief may be "excepted" from the stay and therefore appropriate.[6]

In assessing the appropriateness of recommending injunctive relief, it should be recognized that injunctive relief is more likely to ensure prompt success in achieving ultimate compliance than most postjudgment measures.

c. *Directing the Recommendation:* Recommendations for protective order injunctive relief should be promptly submitted, as indicated below, with a copy to Division of Operations Management:

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[5] *NLRB v. C.C.C. Associates*, 806 F.2d 534, 539–540 (2d Cir. 1962) (use of supplementary administrative proceeding, including investigative subpoenas, to establish derivative liability of corporate principals); *Concrete Mfg. Co.*, 262 NLRB 727, 727–729 (1982) (use of supplementary proceedings after liquidation of backpay to determine derivative liability); *U.S. v. Neidorf*, 522 F.2d 916, 917–920 (9th Cir. 1975), cert. denied 423 U.S. 1087 (suit against fraudulent transferees of corporate assets); *In re Kaiser*, 722 F.2d 1574, 1582–1583 (2d Cir. 1983) (attack on fraudulent conveyance in bankruptcy); *In the Matter of Vecchione*, 407 F. Supp. 609, 612–616 (E.D.N.Y. 1976) (same; fraudulent concealment).

[6] The stay excepts from its operation certain exercises of "police and regulatory power" (11 U.S.C. § 362(b)(4) and (5)). These exceptions permit nonbankruptcy injunctive relief that affects a debtor's assets in some cases. See *CFTC v. CoPetro Marketing Group*, 700 F.2d 1279, 1283–1284 (9th Cir. 1983); *SEC v. First Financial Group of Texas*, 645 F.2d 429, 437–440 (5th Cir. 1981); *FTC v. R. A. Walker & Associates*, 37 B.R. 608, 610–612 (D.D.C. 1983).

1. From issuance of complaint to issuance of Board order: Division of Advice (Associate General Counsel and Assistant General Counsel, Injunction Litigation)

2. From issuance of Board order to issuance of court judgment: Division of Enforcement Litigation, Appellate Court Branch (Deputy Associate General Counsel)

3. After issuance of a court judgment: Division of Enforcement Litigation, Contempt Litigation Branch (Assistant General Counsel).

d. *Form and Content of Recommendation:* As time is of the essence, the appropriate branch or division should be advised telephonically that a recommendation is forthcoming. Generally, the respondent should not be given advance notice of the Region's intention to make such a recommendation because of the limited deterrent value of such notification and because experience indicates that notification may cause harm to the Board's ability to obtain relief, for example, by causing a respondent to accelerate its evasive conduct or by compromising confidential sources. The recommendation should be submitted as expeditiously as possible and include the following:

1. A description of the status of the case, including citations to any reported Board or court decisions or the docket numbers, dates of issuance, and copies of any unreported decisions;

2. A narrative outline of the conduct giving rise to the recommendation, based on as thorough an investigation as time permits;

3. Any relevant exhibits or available statements of witnesses; factual narratives by regional personnel based on firsthand knowledge; the names, addresses, and telephone numbers of sources utilized in the Region's investigation of the conduct;

4. The name, address, and telephone number of the respondent's counsel and, if appropriate, the names, addresses, and telephone numbers of other parties to any transaction or potential transaction involved in the recommendation, or those of their counsel, if known;

5. If backpay has not already been liquidated, a copy of the backpay specification; if no specification has issued, as detailed an estimate as possible of the respondent's current backpay liability.

e. *Regional Role during Pendency of Injunctive Proceedings:* Any requests by Washington for further investigation by the Region, either prior to initiating or during litigation, should be handled expeditiously. Respondents who are subject to injunctive proceedings may be characterized by a lack of candor and cooperation with the Board. Thus, it should not be taken for granted that any respondent will respect the pendency of injunction proceedings, or the issuance of an injunction itself, by refraining from evasive conduct. Accordingly, the Region should thoroughly monitor any additional actions by the respondent to evade compliance.

Following issuance of the injunction, it should closely monitor the respondent's compliance with all injunctive provisions, particularly those requiring disclosure of information to the Region, turnover of documents, or establishment of escrow accounts or other forms of security, and promptly report any failure or refusal to comply with any provision to appropriate Washington personnel with a recommendation that contempt be sought. Noncomplying respondents should be notified in writing of the sanctions for failure to comply, including contempt, and the precise respects in which the Region believes the respondent has failed to comply.

10643.2 *Notice and Constructive Notice to Third Parties:* Notice of Board and related proceedings should be given to third parties actually or potentially involved in significant asset transactions with a respondent inasmuch as derivative liability against third parties "in active concert or participation" with a respondent, depends on "actual notice."[7] Similarly, successorship liability[8] and, of equal practical importance, successor's ability to arrange indemnification for such liability, also turn on notice (sec. 10510.9). Accordingly, in any case in which it appears that actual or potential third parties are or may be engaging in significant asset transactions with a respondent, the following procedures should be followed:

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[7] *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13–15 (1945); Fed.R.Civ.P. 65(d).
[8] *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184–185 (1973).

a. *Service of Pleadings; Advisory Letters:* On discovery of the involvement of a third party in current or potential asset transactions with a respondent that appear likely to impair the respondent's ability to comply, the Region should ordinarily serve the third party with copies of pleadings in the case (particularly the complaint or backpay specification and any decisions), together with a letter setting forth, briefly and in an impartial and nonadversarial manner, the reason(s) for service and a short statement of the third party's potential exposure, such as the amount or estimated amount of backpay due. Service should be by certified mail, return receipt requested. The intent of the letter should not be to impair the sale but rather solely to give notice to potential or actual purchasers of the respondent's assets of the pending proceedings with the Board. Care should be taken not to state or imply that the third party is a successor or may be a successor, but rather to put the party on notice of pending proceedings. (See sec. 10510.8 for notice in contempt cases.) A sample letter is set forth below:

Mr. Edward Entrepreneur, President
Smallcorp Company, Inc.
1111 Acquisition Avenue
Lake Success, New York

Re: NiceCo Enterprises, Inc.
Case 00–CA–0000
(C.A. 2, No. 84–0000)

Dear Mr. Entrepreneur:

We are advised that Smallcorp Company, Inc. is contemplating the acquisition of NiceCo Enterprises, Inc. [or of specific assets, etc.], which is a party respondent to litigation with the National Labor Relations Board currently pending before the United States Court of Appeals for the Second Circuit [or United States District Court, or Board, as appropriate]. Accordingly, this is to advise you of the instant proceedings involving NiceCo, which are more fully described in the enclosed motion for protective restraining order [or petition for adjudication in civil contempt, or unfair labor practice complaint, or backpay specification, as appropriate]. The [potential] backpay liability at issue is approximately [amount].

Should you have any questions concerning this matter, please feel free to contact [name] of this office at [telephone number].

Thank you for your attention.

Very truly yours,

(Regional Director)

If the Region believes, based on unusual circumstances, that notice should not be given, the matter should be submitted to the Contempt Litigation Branch, with a copy to the Division of Operations Management.

The Region should continue to serve such documents, notwithstanding a third party's claim of lack of relationship to the respondent. Threats by the respondent or a third party to initiate litigation against the Board or its representatives on the basis of such notice, for example, a threat to initiate a suit based on tortious interference with contractual advantage, should be referred to the Special Litigation Branch, with a copy to the Division of Operations Management. In the absence of contrary instructions, such threats should not, however, deter efforts to make or continue such service.[9]

b. *Use of Lis Pendens, Notice of Pendency, Notice of Interest, or Similar Devices for Giving Constructive Notice, in Cases Involving Real or Personal Property:*

1. *In cases involving injunctive proceedings:* When a motion seeking injunctive relief relating to a respondent's disposition of real property assets has been filed, it is generally recommended that the Region determine whether it is possible to docket a notice of the pendency of such proceedings against the property involved.

[9] Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., 2680(h).

However, under 28 U.S.C. § 1964, it is incumbent on agencies of the United States to conform to the requirements of state statutes authorizing such notice, with the significant exception that agencies of the United States are exempted from bonding requirements by 28 U.S.C. § 2408. Regions should therefore thoroughly familiarize themselves with *lis pendens* laws in all states within their respective jurisdictions, determine the formal requirements for filing such a notice, and seek clearance from the Division that is processing the injunctive proceedings prior to filing or recording such notice.

A notice of pendency, when permissible by law, serves as constructive notice to all subsequent purchasers and encumbrancers of the property, thereby tending for practical reasons to protect the status quo during injunction litigation and limit a respondent's ability to dispose of real property to bona fide purchasers. In addition, a notice of pendency is typically the only way to register an injunction, as opposed to a judgment, once one is issued.

Some jurisdictions also permit such notice to be utilized in actions affecting certain types of personal property; however, such notice is, like that applying to real property, inappropriate unless the injunctive litigation involved seeks to reach specific personal assets.[10] When permitted, the use of such notice relative to personal property is subject to the same instructions as set forth above concerning real property.

2. *In cases when there are no injunctive proceedings:* Accordingly, the use of a *lis pendens* or *any* such notice relative to proceedings *other than those seeking injunctive relief against dissipation of real property assets or other assets, is generally* not appropriate.[11]

10643.3 *Recording Judgments Liquidating Amount of Backpay or Other Monetary Obligations:* In any case in which a court judgment has issued fixing the specific amount of backpay due or other monetary liability of a respondent and the respondent has not made prompt arrangements for the full satisfaction of its liability satisfactory to the Region, the judgment should, in the absence of circumstances convinc-

[10] See generally 51 Am Jur 2d §§ *Lis Pendens* 18–20 (1970).

[11] *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1319–1321 (3d Cir. 1982); *Cayuga Indian Nation v. Fox*, 544 F. Supp. 542, 547–548 (N.D.N.Y. 1982); 51 Am Jur 2d § *Lis Pendens* 23 (1970).

ing the Region that payment in full is ensured, be recorded against the respondent's real property and, if permitted by state law, personal property to create a lien on that property. A judgment lien, although not providing satisfaction of a judgment, is a preliminary step to a levy of execution not only against property of the respondent but also against any property of the respondent that has been transferred to a third party with actual or constructive notice of the outstanding lien. (See sec. 10510.8.) A lien also operates to protect the judgment by giving the Board the status of a secured creditor in the event of subsequent bankruptcy, and preference over junior lienholders.[12]

a. Most States have enacted statutes that permit the creation of liens predicated on judgments rendered by courts sitting within the State; some specifically refer to Federal court judgments. The formal requisites for recording judgments, and the types of property against which a lien is created, are governed by state statute. Thus, it is important to become fully conversant with and strictly adhere to the statutory requirements to avoid possible prejudice to the Board's status as a creditor.[13] The Federal lien statute (28 U.S.C. § 1962) provides that every judgment rendered by a United States district court within a state "shall be a lien on the property located in such state in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such state," unless state law fails to provide for perfection of liens based on Federal judgments, in which case the lien becomes effective on registration of the judgment in district court.

b. If the state judgment lien statute is not broad enough to encompass judgments of the United States courts of appeals, or is not applicable because the judgment was rendered outside the jurisdiction where the property against which the lien sought is located, it will be necessary for the Region to take additional steps to register the "foreign" judgment. This may be accomplished under the particu-

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[12] In general, it is state law and not Federal law that governs the perfection and priority of liens. See *Aquilino v. U.S.*, 363 U.S. 509, 512–516 (1960). This principle is implicitly embodied in the Federal lien statute, 28 U.S.C. § 1962 (discussed infra), which controls lien perfection by the Board in the absence of more specific legislation. Id. State law similarly controls lien perfection and priority among secured creditors in bankruptcy. *Butner v. U.S.*, 440 U.S. 48, 54–57 (1979). However, at least in reorganization cases, the fact of bankruptcy may alter the procedural rights of the lien holder to enforce the lien, but not the underlying right to security for the debt in the property subject to the lien. *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 202–207 (1983).

[13] See Memorandum OM 84-62, dated 30 August 1984, entitled "Collecting Money Judgments: Alternatives to Contempt—Draft Guidelines," and the attached charts reflecting state laws governing judgment liens.

lar State's version (if any) of the Uniform Enforcement of Foreign Judgments Act and the Federal registration statute (28 U.S.C. § 1963). Although the latter only refers to judgments of the United States district courts, it has been construed in practice by district court clerks to encompass judgments of the U.S. courts of appeals enforcing Board orders. The refusal of a clerk to register a judgment should be brought to the attention of the Contempt Litigation Branch so that it may seek relief from the appellate court to mandate registration by the district court (sec. 10510.7 generally regarding judgment liens and execution thereon).

c. Because the Federal registration statute provides that registration cannot be affected until the judgment "has become final by appeal or expiration of time for appeal," a considerable period of time (a minimum of 90 days, absent actual filing of a petition for certiorari or rehearing, or an extension of the time in which such a petition may be filed) may run before a judgment lien can be created under this procedure, unless the judgment is entered by consent or default.[14] To protect the Board's interests in the interim, the Region should, whenever possible, also seek to register the judgment pursuant to state statute (Uniform Enforcement of Foreign Judgments Act), inasmuch as such statutes do not require a lengthy waiting period before a judgment may be registered. Prompt registration is particularly important when there is any possibility that the respondent may become financially incapable of complying with the judgment.

10643.4 *Recording Unliquidated Judgments or Board Orders:* Injunction proceedings are generally required to protect Board monetary claims in the absence of a supplemental judgment liquidating backpay (sec. 10643.1). If permitted by state statute, however, the Region may record unliquidated judgments or Board orders under applicable state law, which, at the very least, may provide notice to third parties who may have potential derivative liability.

10643.5 *Certification of Checks; Cashiers' Checks:* When a delay in the delivery of the checks to the payees appears imminent and/or facts are brought to the Region's attention indicating it is appropriate to

[14] See *Herzfeld v. Parker*, 100 F.R.D. 770, 773 and fn. 1 (D.Colo. 1984); *Stanford v. Utley*, 341 F.2d 265, 271 (8th Cir. 1965). See generally Annotation, Construction and Effect of Provision of 28 U.S.C. § 1963 for Registration in Federal District Court of Judgment of Another District, 1 ALR Fed. 326 (1969).

do so, the respondent may be instructed to pay by certified or cashier's check, or his uncertified check presented to the bank for certification.

10644 *Delay in Locating Discriminatees:* If there is an anticipated delay in locating the discriminatee or in obtaining a power of attorney, the respondent will be asked to comply with the following procedure:

a. *Escrow/Net Backpay:* When the Board and/or the court has directed, or when the parties have agreed pursuant to a settlement agreement, that the backpay due a missing discriminatee be placed in escrow,[1] the respondent, when the backpay is *net backpay*, should be instructed to forward to the Regional Office a check for the total amount of backpay and interest plus its share of any FICA tax due. The check should be made payable to the National Labor Relations Board. The respondent should be further advised that once the discriminatee(s) is located, the appropriate amount of FICA and Federal income tax will be deducted and forwarded to the IRS and a check for the balance will be forwarded to the discriminatee. (See sec. 10648.5.) Absent compelling circumstances, if the discriminatee is not located within 1 year of payment or within 1 year from the date the Board's order becomes final, whichever is later, the escrow amount shall be returned to the respondent and the discriminatee's backpay entitlement shall expire.[2]

b. *Escrow/Gross Backpay:* In the situation in which the respondent's check represents *gross backpay*, the respondent should be instructed to forward its check, made payable to the National Labor Relations Board, to the Regional Office for the total amount due, including the respondent's share of FICA tax. (See sec. 10648.5.) The Region will make every attempt to locate the discriminatee and arrange for the respondent, together with the General Counsel's representative, to examine the discriminatee concerning interim earnings, expenses, search for work, etc. (Compare sec. 11751.6(d), which requires clearance by the Division of Operations-Management before allowing cross-examination of discriminatees concerning search for work and interim earnings as a prerequisite for settlement in nonescrow situations.) Thereafter, the Regional

[1] *Starlite Cutting*, 284 NLRB No. 71 (June 30, 1987), clarifying 280 NLRB 1071 (1986), and cases cited therein.

[2] *Starlite Cutting*, supra.

Director shall make a determination concerning the amount of net backpay plus interest due as well as the amount the respondent owes as its share of the FICA tax, and so advise the respondent and, if possible, reach agreement about the net backpay. The amount in escrow will be reduced accordingly, and the balance, if any, will be refunded to the respondent. As noted above, absent compelling circumstances, if the discriminatee is not located within 1 year of payment or within 1 year from the date the Board's order becomes final, whichever is later, the escrowed amount shall be returned to the respondent and the discriminatee's backpay entitlement shall expire.

In the event that no agreement can be reached concerning the net backpay due to the discriminatee, the matter shall be resolved at a backpay hearing. (See sec. 10734.) In the case of an informal settlement agreement, the Region may have to consider revocation of the settlement agreement, unless the settlement agreement contains a provision giving final authority to the Regional Director to determine net backpay, as well as a waiver of charged party's (the respondent's) right to contest the Regional Director's final determination.

c. *Escrow Period/Formal and Informal Cases:* In either case, involving net backpay or gross backpay, the respondent should be advised that at the end of 1 year from the date of the receipt of the backpay funds by the Regional Office or 1 year from the due date the Board's order becomes final, whichever is later,[3] the undistributed amount deposited in escrow will be returned to the respondent and, absent compelling circumstances, the discriminatee's backpay entitlement shall lapse.

In an informal settlement agreement, the 1-year period shall run either (1) from the date of the approval of the settlement by the Regional Director or the denial of the appeal or expiration of the appeal period in a unilateral settlement or (2) from the date of receipt of the funds by the Regional Office, whichever occurs later, and the settlement should contain provisions as above pertaining to the escrow period and the return of undistributed funds to charged party.

[3] *Starlite Cutting*, supra.

d. *Escrow in Cases Involving Bankruptcy or Less than 100 Percent Backpay:* In cases involving bankruptcy proceedings, the total sum allocated by the bankruptcy court should likewise be forwarded to the Regional Office in a check made payable to the National Labor Relations Board. The respondent and/or the receiver in bankruptcy should be advised that the Region will have appropriate (pro rata) amounts, less any withholdings required by law, forwarded to the discriminatee(s). All attempts will be made to locate any missing discriminatee(s). *However*, the respondent/receiver should be told that at the end of 1 year from the date of receipt of the check from the bankruptcy proceeding, or the date the Board order becomes final, whichever is later, any amounts not yet distributed will be disbursed in pro rata shares to those discriminatees whose whereabouts are known. Only in the unlikely event that this additional amount would cause the discriminatee(s) to receive an amount in excess of 100 percent net backpay will the balance in escrow be returned.

For proper handling of backpay checks received by the Region under this section, refer to section 10648.5.

10645 *Amount Due Deceased Discriminatees:* Amount due deceased discriminatees should be paid to the legal administrator of their estates or any person authorized to receive such payments under applicable state law.

10646 *Undistributed Funds Not Subject to Setoff, Liens, Garnishment, etc.; Washington Notice of Attachment Required:* Inasmuch as a backpay award is made in effectuation of a public policy and has no private character whatsoever until distributed, neither the Agency nor the respondent can be held subject to assignments, liens, garnishments, or other processes before the funds have been distributed. By the same token, the execution of a release by the discriminatee to the respondent cannot be binding on the Agency. Nor can the respondent set off debts owed it by the discriminatee against its backpay liability.[1]

If a Regional Director or other Regional Office staff member or a respondent is served with a restraining order of the nature indicated

[1] E.g., *NLRB v. Mooney Aircraft*, 366 F.2d 809, 811 (5th Cir. 1966) (setoff disallowed). For cases dealing with liens, garnishments, etc., see *NLRB v. Schertzer*, 360 F.2d 152 (2d Cir. 1966); *NLRB v. Ozanne*, 307 F.2d 89 (1st Cir. 1962) (dictum reverses this circuit's contrary view in *NLRB v. Underwood Machinery Co.*, 196 F.2d 93 (1952)); *NLRB v. Stackpole Carbon Co.*, 128 F.2d 188 (3d Cir. 1942); *NLRB v. Sunshine Mining Co.*, 125 F.2d 757 (9th Cir. 1942).

above, the Region usually notifies the initiator of the process of the substance of the above paragraph. If the initiator does not agree to withdraw the process, the Region will inform the Division of Operations Management and give details to enable steps to be taken immediately to enjoin the local court proceeding.[2]

10647 *Installment Payments: Terms and Conditions:* Installment payments are permissible only under the terms and conditions set forth in section 10631, supra; see also section 10623.6.

[2] E.g., *NLRB v. Schertzer*, supra; *NLRB v. Sunshine Mining Co.*, supra.

10648–10649 *Taxes and Withholding*

10648 *Income Taxes and Withholding*

10648.1 *Generally:* The employer should be advised to make appropriate income tax deductions for payments to discriminatees made by it including checks delivered to the Regional Office for disbursement.[1] While the responsibility for determining the correct amount to deduct is the employer's, it is advisable for the Regional Office to bring to the respondent's attention before it starts to compute the deductions some of the complications arising out of the nature of the backpay obligation. The discriminatee should be similarly advised, since the payment of a tax not due is obviously prejudicial. Both parties should be apprised that certain elements of backpay are frequently not subject to withholding and sometimes may not even be taxable. Specifically, there is normally no withholding on interest and, arguably, insurance or payments to employees or plans or systems for retirement, death, sickness, accident, hospitalization, and medical benefits are not subject to social security tax or, in some cases, withholding. Advice should not be given to the parties in these areas, but they should be referred to the IRS for counsel and replies to any questions they may have, particularly in cases where these elements of backpay involve substantial amounts.

It is also advisable to require the respondent to submit a copy of the W-2 form that it gave to the discriminatee.

10648.2 *Joint Employer-Union Liability:* A union cannot deduct or withhold Federal or local income taxes except when the union is an employer.[2] Therefore, when the employer and union are jointly liable for backpay, the employer shall deduct from its proportion of the backpay award sufficient tax to cover the entire (including the union's proportion) backpay award and remit such amounts to the appropriate Federal and local revenue agencies in the name(s) of the alleged discriminatee(s) (sec. 10649.2). In order to compensate for the additional contributions to be paid by the employer, it may be appropriate to adjust the respective shares of backpay paid by the employer and the union.

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[1] *Social Security Board v. Joseph Nierotko*, 327 U.S. 358 (1946). Court held that backpay is considered as wages for purposes of social security tax contributions.

[2] *Teamsters Local 249 (Lancaster Transportation)*, 116 NLRB 399 (1956).

10648.3 *Union Solely Liable:* When the union alone is liable, the payment of backpay is not treated as wages paid by or on behalf of an employer for purposes of income tax deduction. Therefore, no income tax deductions should be made.[3] (However, when the union is the employer, normal income tax deductions will be made.)

10648.4 *Counseling Discriminatees:* The discriminatee should be advised that the responsibility for determining the exact amount of income tax eventually due (or refundable) rests with the discriminatee. It should be emphasized that backpay received, whether from an employer, a union, or from both, is taxable as income. The discriminatee should be told how much, if anything, has been withheld for remittance to the IRS; the amounts of backpay attributable to each calendar year of the backpay period; and further that if the backpay renders the total annual income for the year substantially in excess of normal income and thereby places the discriminatee in a higher tax bracket, the individual may be entitled to a reduced formula for computing income for that year and to consult the local IRS office for information concerning the computation of taxes for the year. The discriminatee should also be advised of the elements of backpay that arguably are not subject to withholding or income or social security tax (see sec. 10648.1) and the possibility of refunds for this reason as well and also referred to the IRS for advice and counsel in this area. See also sections 10649.1 and 10649.4 concerning excessive social security withholding.

10648.5 *Tax Deductions for Lump-Sum Payments; Missing Discriminatees; Bankruptcy Payments; and Escrow of Funds for Missing Discriminatees:* When the respondent transmits backpay to the Regional Office for missing discriminatees, or for distribution of a lump sum, including amounts recovered in bankruptcy (secs. 10584.2(c), 10640.2, and 10644), it should be instructed not to make deductions for income or FICA tax. Instead the respondent should transmit the full amount plus its own share of the FICA tax to the Regional Office, which in turn shall transmit the check to the Finance Section, Division of Administration. The respondent should also provide the Region with its Federal tax identification number, which is required by the Finance Section to make the Federal tax disbursements, as well as the social security numbers and last known addresses of all discriminatees receiving backpay, if that information is not already known to the Regional Office. When making disbursement, the Finance Section remits the

[3] *Teamsters Local 249 (Lancaster Transportation)*, 116 NLRB 309 (1956).

appropriate amounts for withholding and FICA taxes to the IRS. In no circumstances should the money be disbursed to the discriminatee without appropriate deductions. If the discriminatee is not located within the prescribed period, the entire amount will be disbursed, after appropriate deductions, to other discriminatees (sec. 10584.2(c)) or the entire remaining sum including the deductions returned to the respondent (secs. 10584.2(c) and 10644).

On receipt of the backpay check from the respondent made payable to the National Labor Relations Board, the Region should write the unfair labor practice case number on the face of the check and send it to the Finance Section, Division of Administration, with an accompanying memorandum. (It is unlawful for a Regional Director to set up an escrow account in his/her name or in the name of the Region.) The transmittal memorandum should contain the unfair labor practice case name and number and explain the purpose of the check. The memo should set forth the name, social security number, and address of each discriminatee, as well as the amount of interest and backpay payable to each. The respondent's Federal tax identification number should be included. Also, that portion of the check representing the respondent's FICA contribution, if any, should be noted. If there are missing discriminatees, the Finance Section should be informed that additional requests for disbursement of the balance of the checks will be submitted as the remaining discriminatees are located.

The Finance Section will withhold and transmit to IRS the appropriate amounts for income tax and FICA and will disburse checks to the discriminatees with an appropriate cover letter, a copy of which will be forwarded to the Region, along with a copy of the check and payroll statement for each discriminatee. The Finance Section will also prepare and transmit W-2 forms to the discriminatees.

If at the end of the period provided for locating discriminatees some are still missing and, thus, there are funds remaining in the account, the Region should submit a final memorandum to the Finance Section setting forth the distribution of the remaining balance, i.e., the amount to be returned to the respondent and/or to be distributed to discriminatees whose locations are known (secs. 10584.2(c) and 10644). When distribution is to be made to discriminatees, the memorandum should list the name, current address, and social security number, and additional sum to be distributed to each discriminatee, as well as the respondent's Federal tax identification number. The Finance Section should be

advised to inform the discriminatees that this is the final disbursement of funds, and that the case is being closed, if otherwise appropriate for closing. Copies of the final disbursement letters should be forwarded to the Region, along with copies of the check and payroll statement for each discriminatee.

When the balance in the account is to be refunded to the respondent, the Finance Section should be requested to draw a check payable to the respondent and forward it to the Region for distribution with the Region's cover letter closing the case, if otherwise appropriate for closing.

10649 *Social Security Taxes and Withholding*

10649.1 *Generally:* The taxes enacted by the Federal Insurance Contributions Act (FICA), which are commonly referred to as the social security tax, are deducted from employee wages, and the employer contributes an equal amount. The rates of these taxes have gradually increased over the years, as has the amount of wages earned by an employee in a calendar year that are subject to the tax (referred to in the statute as the "annual wage limitation"). (See sec. 10649.4 below for discussion of the possible nonapplicability of these taxes to the full amount of an award under the Board's remedy.)

When making deductions for FICA from backpay, as well as its corresponding contributions, if questions arise, the employer should be advised that FICA should be withheld, and contributions made, *at the rates in effect at the time backpay is paid.* Similarly, the annual wage limitation is the limitation in effect when the backpay is paid. Thus, no attempt should be made to withhold taxes or make contributions based on former FICA rates that may have been in effect when the backpay was earned during the years in the backpay period.

The employer bears the responsibility (except if backpay is disbursed by the Finance Section) for withholding the correct amounts for taxes due under FICA. If a dispute with respect to such contributions arises, the Region may obtain information from the IRS or the SSA showing the rates of contribution and annual wage limitation for the current period, or may direct the employer to those agencies for further information. On payment of backpay, the Region should notify the discriminatee to contact IRS and SSA (district office) for any information or advice

best copy available

sought by the discriminatee concerning the payment of taxes or credit for social security benefits flowing from the receipt of the backpay.

10649.2 *Employer Solely or Jointly Liable With Union:* When an employer alone or when an employer and a union are jointly liable for backpay, the employer either individually or as a joint obligor is legally liable for the total amount and it is the employer who deducts the employee tax and matches it with the employer tax on the total amount of the monetary award that is taxable as wages as defined in FICA and not merely on its share thereof. (See secs. 10648.2 and 10648.3.) The term "taxable" means exclusive of interest and possibly other amounts required to be paid under the make-whole remedy, which are not defined as wages in FICA (see secs. 10649.1 and 10649.4). This procedure is necessitated by the fact that since the union, in this context, is not an employer it is not subject to an employer's tax. The following example will illustrate:

Total taxable backpay:	$100
Employer's share:	$50
Union's share:	$50

Employer pays discriminatee $44.15 after deducting 5.85* percent of the *total* backpay of $100 for social security taxes. It reports to the IRS $100 wages paid ($50 by him and $50 by the union) and "matches" the $5.85 of the discriminatee with $5.85 social security taxes to the IRS.

*Social security rate and maximum are subject to change; always use current rate.

10649.3 *Union Solely Liable:* When a union alone is liable for backpay, no social security tax deductions or matching tax payments are required to be made by the union.[1] (But see sec. 10648.3.) However, when the union is the employer, social security tax deductions and matching tax payments will be made by the union.

10649.4 *Tax Refunds:* As a result of social security tax payments being made in connection with backpay, the discriminatee *may* be entitled to a refund of those tax payments based on amounts of earnings over the maximum for which social security taxes are collect-

[1] *Teamsters Local 249 (Lancaster Transportation)*, 116 NLRB 799 (1956).

ed each year and should be advised of such possibility. (See sec. 10649.1.) However, the discriminatee should be referred to the IRS for further details.

10649.5 *Missing Discriminatees:* When an employer respondent transmits backpay to the Region on a lump sum or for a missing discriminatee (e.g., secs. 10584.2(c), 10640.2, and 10644), it should also include the amount of the employer FICA tax at the then current rate. When the lump sum is divided or discriminatees are located, appropriate tax payments are then made by the Agency to the IRS (sec. 10648.5).

10649.6 *Allocation of Social Security Tax to Appropriate Quarters:* Unless arrangements are made to the contrary, social security taxes are usually credited to the quarter in which they are paid. This may result in the discriminatee receiving no credit or less credit than would otherwise be received in the various quarters of the backpay period. As a result, discriminatee ultimately receives less benefits. The discriminatee should bring the nature of the backpay payment to the attention of the district office of the SSA; that office will see that the payments are credited to the quarters in which they would have been earned during the backpay period.[2] Accordingly, the discriminatee should be notified, in the letter forwarding the backpay check, to contact the district office of the SSA immediately on receipt of the backpay concerning crediting of backpay toward any eventual benefits to which the discriminatee may be entitled. The district office will then advise the discriminatee of the documentation, e.g., backpay specification, quarterly/yearly breakdown of net backpay or gross backpay/interim earnings, required by the SSA to support the claim of additional benefits. The Regional Office should cooperate in providing such documentation on request. To supply the requisite proof, the compliance officer should offer to furnish the discriminatee a statement setting forth the quarters in which the backpay was earned and the amount earned in each quarter and refer such person to the district office of the SSA for further counseling. Thereafter, the compliance officer should exert all efforts to obtain and furnish any additional information the district office may require.

[2] *Social Security Board v. Joseph Nierotko*, 327 U.S. 358 (1946). Court held that Social Security Board should allocate backpay as wages to the calendar quarters in which the backpay would have been earned.

10650–10746 *Formal Proceedings*

10650–10722 *Pretrial Procedures; Investigation; Backpay Specification; and Notice of Hearing*

10650–10652 *Backpay Specifications; Initiation of Formal Proceedings*

10650 *Issuance Following Court Judgment; Authorization Not Required:* Normally proceedings await issuance of a court judgment enforcing the Board's order, especially when other portions of the Board's order are not complied with or the backpay period has not ended. Authorization to initiate proceedings is not required after court judgment (sec. 10656.2). (But see secs. 10509.7 and 10628.2 for reinstatement and backpay issues involving contempt considerations.)

10650.1 *Backpay Proceeding Combined with Unfair Labor Practice Proceeding:* In some cases, however, notably those in industries where employment is limited to relatively short periods of time, such as the construction industry, or because of early reinstatement of discriminatees, backpay periods may have ended before the unfair labor practice hearing begins. Where the backpay issues are simple and their introduction will not confuse, impede, or unduly prolong the hearing, formal backpay proceedings may be included in the unfair labor practice hearing. The backpay computation should be completed as soon as possible after the backpay period has been permanently terminated. If simultaneous trial of the unfair labor practice and backpay issues is appropriate, a backpay specification modified to suit the circumstances should be prepared and served on the respondent in addition to the complaint.

10652 *Absent Court Judgment Authorization Required:* If the Regional Director believes that formal backpay proceedings should not await enforcement proceedings and, in addition to circumstances noted above (e.g., the backpay period was terminated), (a) there is no question but that the respondent will comply once the backpay problem has been resolved or (b) because of the respondent's bankruptcy speed in fixing backpay is essential, the Region may seek to secure a stipulation for backpay hearing absent court judgment. See Section 10652.1. Absent such a stipulation, authorization to initiate backpay proceedings is required.

10652.1 *Sample Stipulation for Backpay Hearing Absent Judgment; Application to Other Compliance Issues:* An appropriate stipulation

for a backpay hearing absent a court judgment is set forth below. As indicated by the bracketed material, it may be applied to compliance issues other than backpay.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Acme Mattress Co., et al.[1]

and Case 21-CA-251

Floyd A. Littlejohn,
an Individual

STIPULATION

The following matters are stipulated by and between respective counsel for both the Respondent and the General Counsel for the National Labor Relations Board:

1. The Respondent has not been able to reach agreement with the Board concerning the amount of backpay due Floyd A. Littlejohn (or the liability of _____ Co., as successor to _____ Co., for the backpay XYZ was ordered to pay Floyd Littlejohn herein) under the terms of this Order. Accordingly, the Respondent reserves the right to a hearing before an administrative law judge to determine the amount of backpay due in this case (or the compliance issue described herein). The Respondent further reserves its right to have the decision of the administrative law judge following such hearing, reviewed by the Board in due course, and its right to seek review of the Board determination by a Federal court of appeals. In the event the Respondent seeks such review, it is understood the only issue before the Board or court will be the amount of backpay due Floyd A. Littlejohn (or the compliance issue described herein), all other issues having been waived as set forth in paragraph 2, below;

2. The Respondent hereby waives its right under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) to contest either the propriety of the Board's Order issued on December 30, 19XX or the findings of fact and conclusions of law underlying that Order;

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[1] The case caption should include any other respondents in the underlying proceeding, the stipulation should be executed by all respondents, absent unusual circumstances.

3. The Regional Director for Region 21 may issue an order setting a date for hearing before an administrative law judge to determine the amount of backpay due in this case (or the compliance issue described in paragraph 2 hereof);

Los Angeles, California
June ____, 19XX

_____
Respondent

Los Angeles, California
June ____, 19XX

_____
Respondent

Recommended:

Los Angeles, California
June ____, 19XX

_____
Attorney, NLRB

Approved:

Dated: _____

_____
Regional Director, Region 21
National Labor Relations Board

10652.2 *Contents of Authorization Request:* The authorization request should contain a brief chronological statement of compliance efforts, a summary of the parties' respective positions, and a treatment of any novel or important policy questions.

10653 *Settlement Stipulation on Backpay; Security Agreement; Installment Payments:* In those situations in which, pursuant to an enforced Board Order, the amount of backpay is computed and paid, there is ordinarily no need for a supplemental court judgment concerning the payment of backpay. However, in some cases, including those in which the backpay is to be paid in installments, Regions may consider it advisable to seek a formal settlement and security agreement. An example of such a settlement and security agreement is set forth below and can be modified for specific case situations:

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION ____

ABC COMPANY

and Case _____

XYZ UNION

STIPULATION CONSENTING TO AMOUNT OF BACKPAY, SCHEDULE FOR PAYMENT AND THE ENTRY OF A SUPPLEMENTAL BOARD ORDER AND CONSENT JUDGMENT

IT IS HEREBY STIPULATED AND AGREED, by and between ABC Company (the Respondent), XYZ Union (the Union), and the General Counsel of the National Labor Relations Board, that:

1. On _____, the National Labor Relations Board (the Board), issued its Decision and Order (____ NLRB ____) directing the Respondent to, inter alia, make whole employees _____, _____, and _____ for any loss of earnings such employees may have suffered by reason of the Respondent's unfair labor practices in violation of Section 8(a)(3) of the National Labor Relations Act, as amended (the Act).

2. On _____, the United States Court of Appeals for the _____ Circuit entered its judgment in Civil No. _____, enforcing in full the Board's Order referred to above in paragraph 1.

3. A controversy having arisen concerning the amount of backpay due under the terms of the above Decision and Order of the Board, the Regional Director for Region ____, pursuant to authority conferred by the Board, issued a Backpay Specification and Notice of Hearing on _____, which was later supplemented by Amendments to Backpay Specification, issued on _____, and _____, receipt of which are hereby acknowledged, alleging that the above-named employees were due certain sums of money as a result of their losses occasioned by the Respondent's unfair labor practices.

4. On _____, _____, and _____, respectively, the Respondent filed its Answer, Supplemental Answer and Amended Answer, admitting in part, and denying in part, the allegations of the Backpay Specification and Amendments thereto.[1]

5. All parties hereto waive the filing of answer,[2] hearing, Administrative Law Judge's Decisions, the filing of exceptions and briefs, oral argument before the Board, the making of findings of fact or conclusions of law by the Board, and all further and other proceedings to which the parties may be entitled under the Act or the Board's Rules and Regulations.

6. This Stipulation, together with the Board's Decision and Order reported at _____ NLRB _____, the Court Judgment referred to above in paragraph 2, the Backpay Specification and Notice of Hearing and Amendments thereto referred to above in paragraph 3, [include affidavits of service of Backpay Specification and Notice of Hearing if service and receipt by the parties have not been acknowledged above in paragraph 3], the Answer [Supplemental Answer] [Amended Answer] referred to above in paragraph 4, [answer(s) only to be included if the Respondent insists], and Security Agreement, all of which documents are attached hereto, shall constitute the entire record herein.

7. Following the issuance of the Backpay Specification and Notice of Hearing and Amendments thereto referred to above in paragraph 3, the Respondent, the Union, and the General Counsel of the Board, acting through their respective counsel, reached agreement on the amount of backpay due and owing under the terms of the aforesaid Decision and Order of the Board, as enforced by the Court of Appeals for the _____ Circuit. Said agreement has been reduced to writing in this Stipulation and based upon it, the obligation of the Respondent to make whole employees under the Board's Decision and Order and the Judgment of the United States Court of Appeals for the _____ Circuit will be discharged by payment to the employees named in the Schedule below of the amounts set opposite their names in that Schedule, on the dates indicated, plus interest accrued to the date of payment, as set forth, minus the tax withholdings required by the Federal and State laws.

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[1] The Respondent's Answer, etc., if filed, should become a part of the record only if the Respondent insists; preferably, it should be withdrawn.

[2] Delete "answer" if the Respondent insists that its Answer become part of the record.

8. Upon this Stipulation and the record herein, as described in paragraph 6 above, and without any further notice of proceedings herein, the Board may enter a Supplemental Order forthwith providing as follows:

The Respondent, ABC Company, its officers, agents, successors, and assigns, shall:

Take the following affirmative action to effectuate the policies of the National Labor Relations Act, as amended:

(a) Make whole the following employees for loss of pay suffered by reason of the discrimination against them, by payment to them of the amounts set forth opposite their respective names and at the times set forth in the schedule that follows. In consideration of timely payment of all but the final installment of the amounts due each employee in accordance with such schedule, plus interest, payment of said final installment is hereby waived; but if any installment other than the final installment is not paid on or before the date due, the full unpaid amount shall become immediately due and payable and the Board may, without further notice, institute proceedings against the Respondent for the collection of the full indebtedness remaining due, with additional interest due on the entire unpaid balance from the date of default until full payment is received, computed in accordance with the formula set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

SCHEDULE

Employee	Date of Payment	Backpay	Interest	Total

(b) Within 10 days of entry of the Board's Supplemental Order, the Respondent shall provide the Board with a security interest in all real property, fixtures, equipment, machinery, vehicles, inventory, accounts receivable, and bank accounts owned by the Respondent or any of its affiliates; in the proceeds of such collateral; and, in all increases, substitutions, replacements, additions, and accessions to such collateral. To evidence such interest, the Respondent agrees to execute simultaneously herewith the annexed Security Agreement, mortgages, and financing statements. The Respondent shall be responsible for, and bear all expenses relating to, providing such security, including the recording thereof.

9. The United States Court of Appeals for any appropriate circuit may, upon application by the Board, enter its judgment enforcing the Supplemental Order of the Board, in the form set forth in paragraph 8 hereof. The Respondent waives all defenses to the entry of the judgment, including compliance with the Supplemental Order of the Board, and its right to receive notice of the filing of an application for the entry of such judgment, provided that the judgment is in the words and figures set forth in paragraph 8 hereof. However, the Respondent shall be required to comply with the affirmative provisions of the Board's Supplemental Order after entry of the judgment only to the extent that it has not already done so.

10. This Stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal or otherwise, that varies, alters, or adds to it.

11. This Stipulation, together with the other documents constituting the record, as described in paragrapl. 6 above, shall be filed with the Board. The Stipulation is subject to the approval of the Board and it shall be of no force and effect until the Board has granted such approval. Upon the Board's approval of the Stipulation, the Respondent will immediately comply with the provisions of the Supplemental Order as set forth in paragraph 8 hereof.

Signed at _____, _____

(city) (state)

ABC COMPANY

By _____

(name and title)

_____

(street)

_____, 19___ _____

(date) (city and state)

Signed at _____, _____

(city) (state)

XYZ UNION

By _____

(name and title)

_____

(street)

_____, 19___ _____

(date) (city and state)

Signed at _____, _____

(city) (state)

Approval by the General Counsel recommended:

John Smith
Attorney, Region _____
National Labor Relations Board

[address]
[date]

Approved:

_____

Office of the General Counsel

National Labor Relations Board

Washington, D.C. 20570

_____, 19____
(date)

SECURITY AGREEMENT

Pursuant to the Stipulation dated _____, and _____, 19___, ABC Company (the Debtor) and the National Labor Relations Board (the Board), agree:

1. As collateral security for the payment of all monies due, or which may become due, under the Decision and Order of the Board (_____ NLRB _____), enforced by the Circuit Court of Appeals judgment of _____ in Civil No. _____ and the above-referenced Stipulation, and in consideration of the settlement of the pending litigation between the parties, Debtor grants to the Board a security interest in the following collateral owned by Debtor or its affiliates, including _____ and _____.

   A. All real property, including but not limited to:

      _____ and _____ (legal description of properties should be included);

   B. All fixtures, equipment, machinery, vehicles, inventory, accounts receivable, and bank accounts;

   C. All proceeds from the above collateral; and,

   D. All increases, substitutions, replacements, additions, and accessions to the above collateral.

2. Debtor shall provide the Board with written notice, to the Board's Regional Office in _____, within 10 days thereof, of all material increases, substitutions, replacements, additions, and accessions to the above collateral; of any changes in the Debtor's place of business; and, of the opening of any new places of business, including businesses run by wholly owned subsidiaries.

3. To the extent applicable, the Uniform Commercial Code of the State in which the collateral is located shall govern the security interests provided for herein. Debtor shall take such steps and execute and deliver such financing statements, mortgages, and other documents required by the Code, other applicable laws, or as the Board may from time to time request.

4. Excepting security interests recorded prior to _____, Debtor shall not pledge, mortgage, create, or suffer to exist a security interest in any of the above collateral in favor of any other party other than the Board or dispose of any of the above collateral without the prior written consent of the Board.

5. Debtor shall keep the collateral in good condition and repair, reasonable wear and tear excepted, and will permit the Board and its agents to inspect the collateral at any time. Debtor will insure the collateral against all hazards requested by the Board, in form and amount satisfactory to the Board. If Debtor fails to obtain insurance, the Board shall have the right to obtain it at Debtor's expense. Debtor assigns to the Board all right to receive proceeds of insurance not exceeding the unpaid balance due, directs any insurer to pay all proceeds directly to the Board, and authorizes the Board to endorse any draft for the proceeds.

6. Debtor shall pay when due all taxes that are or may become a lien on the property and shall defend the collateral against the claims and demands of all persons. Debtor shall notify the Board in writing within 5 days after service on it of any summons or other process or notice issued in any action, suit, proceeding, or in which any judgment, decree order, or determination may affect or result in any lien or charge on any of the above collateral.

7. All advances, charges, costs, and expenses, including attorneys' fees, incurred or paid by the Board in exercising any right, power, or remedy conferred by this agreement, or in the enforcement thereof, shall become part of the indebtedness secured hereunder and shall be paid to the Board by the Debtor immediately and without demand.

8. Upon default by Debtor in the performance of any covenant or agreement herein or in the discharge of its liability to the Board under the _____ Circuit's _____ judgment in Civil No. _____ or the above-referenced Stipulation, the Board shall have all of the rights and remedies provided under the Uniform Commercial Code of _____ or other applicable law and all rights provided herein, all of which rights and remedies shall, to the full extent permitted by law, be cumulative. The Board may require Debtor to assemble the collateral and make it available to the Board at a place to be designated by the Board that is reasonably convenient to the Board and Debtor. Any notice of sale, disposition, or other intended action by the Board, mailed to Debtor at the address shown on the Board's records, at least 5 days prior to such action, shall constitute reasonable notice to Debtor. The waiver of any default hereunder shall not be a waiver of any subsequent default.

9. All obligations of Debtor hereunder shall bind its officers, agents, successors, and assigns.

This Agreement is executed on _____, 19____.

NATIONAL LABOR RELATIONS BOARD

By: _____

ABC Company

By: _____

Title: _____

10654 *Regional Procedure After Court Judgment:* After the issuance of court judgments enforcing Board orders, all computations and investigations should be undertaken as though they were being done preparatory to a backpay hearing. Shortcuts should be avoided at all times unless compliance or settlement is a *certainty*. This may seem to involve an excessive amount of effort, but experience has indicated that in the long run savings in time and effort and the stipulation of voluntary compliance and settlements will result from the knowledge by the respondents that there is no hesitation or lost motion in efforts to obtain compliance.

10654.1 *Priority:* Formal backpay proceedings growing out of 8(a)(3) and 8(b)(2) violations should be given the same priority as other 8(a)(3) or 8(b)(2) cases at various other stages. See section 11740.

10654.2 *Notice of Hearing Without Specification; Authorization Required:* When the Region believes this procedure should be used (e.g., a situation in which speed of action is important), prior authorization from the Division of Operations Management should be obtained. The memo should contain a full statement of the Regional Director's reasons for utilizing this procedure (sec. 10652.2). See Rules and Regulations, Sections 102.52, 102.53, and 102.54.

10656 *Preparation of Backpay Specification or Notice of Hearing Alone*

10656.1 *Fundamental Purpose of Specification:* The fundamental purpose of the specification is the narrowing of issues in controversy at the backpay hearing. The specification should inform the respondent of the General Counsel's rationale and conclusions and must contain not only the arithmetic calculations entailed but a statement of each step going into the amounts of net backpay claimed. The specification should be as specific, detailed, and accurate as the circumstances of the case permit. Each affirmative allegation should be so set forth to call for an admission or a denial in the respondent's answer. Those allegations that the respondent fails to deny specifically, which are within its knowledge, are deemed to be admitted.

10656.2 *Regional Responsibility for Issuance and Preparation:* The decision to initiate a backpay hearing may be made by the Regional Director without clearance from Washington if a court judgment has issued. A backpay specification is prepared and served over the signature of the Regional Director. See Sections 102.52 and 102.53 of the Board's Rules and Regulations covering this matter. Following issuance of the backpay specification, the case shall be assigned to an attorney in the Regional Office for trial.

10656.3 *All Joint Respondents To Be Named; Proportional Compliance Notwithstanding:* In cases of joint and several liability, when one of the parties has paid its "share" (see sec. 10636) it should nevertheless be named as a respondent in a formal backpay proceeding.

10656.4 *Notice of Issuance to Division of Operations Management:* On issuance of a specification, the Regional Director should forward one copy to the Division of Operations Management with a short memorandum summarizing the number of individuals involved,

the total amounts of gross and net backpay, and any special problems involved in the case.

10656.5 *Affirmative Allegations:* The backpay specification should contain affirmative allegations concerning the method used for computing gross backpay, supporting gross backpay tabulations, the specific amount of gross backpay claimed for each discriminatee, all the basic facts leading to the resulting figures (e.g., the rates of pay, hours of representative or replacement employees, the backpay period, etc.), and the expenses claimed by the discriminatees.

10656.6 *Pleading Interim Earnings; Willful Idleness; and Unavailability:* The backpay specification will *not* allege that the discriminatees earned specific amounts of interim earnings; these should be *admitted* in the specification. The backpay specification will *not* allege that the discriminatees made a reasonable search for work. It is the burden of the respondent to prove that they did not make such a search.

10656.7 *Basic Data and Method of Computation To Be Pleaded in Specification Text:* The basic data from which the gross backpay specification data was derived are normally included in the body of the specification lest its inclusion in an appendix fail to evoke an answer and thus narrow the issues. Thus, after a descriptive opening paragraph of the method used to compute gross backpay, this data may be presented in the form of a table or schedule (or several, if that seems desirable) to summarize near the beginning of the specification the data on which the individual gross backpay computations are based. On the basis of the respondent's answer to this portion of the specification, the trial attorney may be able to determine to what extent it may be necessary to introduce evidence by the compliance officer or otherwise to sustain the burden of proof on gross backpay, or whether any proof is needed at all in this regard. (See sec. 10664.)

10656.8 *Appendixes May Set Forth Actual Computations:* In small cases, the appendix setting forth the backpay computation may be composed of photocopies of Form NLRB-4312. However, in large cases featuring long pay periods, where the use of these forms would result in an excessive number of attachments, the data from these forms (which should be used as worksheets) should be transcribed to a tabulation that would present it more concisely. (See sec. 10656.13, par. c.)

10656.9 *Waiving Backpay; Unavailability and Willful Idleness:* When there is no doubt whatsoever that particular discriminatees are entitled to no backpay, their case is not in controversy and no reference should be made to them in the specification. Thus if a discriminatee were institutionalized or disqualified because of illness, injury, school attendance, retirement, etc., within the criteria laid down in sections 10612, 10618, and 10620 during the entire backpay period, no claim for backpay should be made on that individual's behalf. If, however, the discriminatee was disqualified for only part of the period this fact should be admitted for the period of disqualification. In cases of doubtful willful idleness or doubtful availability for employment, a claim for backpay should be asserted subject to appropriate proof by the respondent at the hearing.[1]

10656.10 *Missing Discriminatee:* If a discriminatee is missing at the time of hearing and interim earnings data has not been obtainable, the backpay specification should include the claim at the level of full gross backpay.[2] See section 10734 for statement to be made at hearing.

10656.11 *Uncooperative Discriminatee:* The Board's backpay remedy is a public and not a private right and is directed primarily towards effectuating the purposes of the Act; i.e., discouraging the commission of unfair labor practices. To waive backpay for uncooperative discriminatees would be, in effect, leaving to such irresponsible discriminatees the effectuation of public policy. This is clearly inadmissible and unjustifiable.[3] Consequently, when discriminatees are uncooperative, backpay claims should be made in their names. Subpoenas may be issued for their appearance at backpay hearings, and their testimony compelled. If interim earnings information is not available for them, gross backpay should be stated for each, and no admission should be made concerning interim earnings and employment. Net backpay will

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[1] *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1709 (1965), enfd. 360 F.2d 569, 575–576 (5th Cir. 1966) ("incredibly low" interim earnings do not create a presumption of willful loss).

[2] The nontestifying discriminatee's backpay will be held in escrow for the period of time specified in the order. After deductions have been made for any interim earnings, the amount can be turned over to the discriminatee if discovered during this period. Otherwise, the money will be returned to the respondent (secs. 10644 and 10648.5). *Starlite Cutting*, 284 NLRB No. 71 (June 30, 1987), clarifying 280 NLRB No. 120 (June 24, 1986), and cases cited therein. See also *Mastro Plastics Corp.*, 136 NLRB 1342, 1348 (1962), modified on other grounds 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966); *Brown & Root, Inc.*, 132 NLRB 486, 497 (1961), enfd. 311 F.2d 447 (8th Cir. 1963); *Hill Transportation Co.*, 102 NLRB 1015, 1024 (1953); *Tri-Maintenance & Contractors*, 257 NLRB 226 (1981).

[3] See *Steve Alot Ford, Inc.*, 190 NLRB 661 (1971).

thus be the same as gross backpay in these cases. The respondent will have the burden of proving any offsets to gross backpay.[4]

10656.12 *Deceased Discriminatee:* Backpay should be claimed for deceased discriminatees in the backpay specification and, when collected, paid as provided in section 10645. The date of death of such discriminatees should not be affirmatively alleged, but should be admitted if known. This fact, once again, is one tending to mitigate the backpay obligation of the respondent, hence is to be proven by it.

10656.13 *Sample Specification:* A simple backpay specification and notice of hearing follows for *illustrative* purposes. Use it as a guide and vary language and arrangement to meet requirements of the particular case for which a specification is prepared. Refer to section 10656.14, which follows the sample backpay specification, for guidance in cases which have numerous discriminatees or are otherwise complex.

a. *Paragraph designation:* The paragraph designation system of the sample specification may be altered to accord with Regional Office practice or the requirements of a particular case. But there should be a paragraph and subparagraph outline consistently lettered or numbered to enable the respondent in its answer to refer to the specification by the several paragraphs and subparagraphs (rather than by descriptive phrases) for the purposes of making denials, admissions, and explanations with the specificity required by Section 102.54 of the Board's Rules and Regulations. Because the sample specification is illustrative, only the first of each of the various appendixes referred to in various paragraphs of the text are reproduced.

b. *Demand for interest:* Note that because the Board includes interest accrued on back wages as part of the make-whole remedy the summarizing paragraph of the specification (12 in the sample) indicates that interest is to be added to the amounts of net backpay found due.

c. *Interest computation deferred:* Because at the time of drafting the specification the date of payment (which will end the accrual of interest) cannot be known, do not set forth partial amounts of interest in the specification. If Form NLRB-4312, Computation of

[4] But compare *American Navigation*, 268 NLRB 426 (1983); *Ad Art*, 280 NLRB No. 114 (June 24, 1986).

Backpay, is used as an attachment to the specification, the space for interest computation on it will be left blank.

10656.14 *Sample of Specification Computation:*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 15

ACME MATTRESS CO.

and Case 15–CA–251

FLOYD A. LITTLEJOHN,
an Individual, et al.

MATTRESS WORKERS'
UNION OF
AMERICA, Unaffiliated

and Case 15–CB–17

FLOYD A. LITTLEJOHN,
an Individual, et al.

BACKPAY SPECIFICATION AND NOTICE OF HEARING

The National Labor Relations Board, having on November 30, 19xx, issued its Decision and Order directing the Respondents, Acme Mattress Co. and Mattress Workers' Union of America, Unafffiliated, to make whole Floyd A. Littlejohn, Susan Fine, and Emma Lewis for their losses resulting from the Respondents' unfair labor practices in violation of Section 8(a)(3) and 8(b)(2) of the Act, the Court of Appeals for the Fifth Circuit having on February 28, 19yy, entered its judgment enforcing in full the backpay provisions of the Board's Order herein and controversy having arisen over the amount of backpay due under the terms of the Board's Order, the Regional Director of the National Labor Relations Board for Region 15, pursuant to authority duly conferred upon him or her by the Board, hereby issues this Backpay Specification and alleges that the backpay due under the Board's Order, as enforced by the Court of Appeals for the Fifth Circuit, is as follows:

1. The quarterly gross backpay of each discriminatee is the product of adjusted weekly average hours worked by testers in each calendar

quarter of the backpay period for each discriminatee multiplied by the wage rates the discriminatee would have received plus the vacation pay and Christmas bonuses said individual would have received in appropriate quarters of the backpay period.

2. The adjusted weekly average hours of testers is the weekly average based on the hours of all testers employed by the Respordents during each week of the backpay period who worked 24 hours or more in a week, adjusted to a straight- (or regular-) time basis by converting all overtime hours to straight time at the rate of 1 overtime hour equaling 1-1/2 straight-time hours.

3. The adjusted average hours of testers as defined above during the calendar quarters of the backpay period were as follows:

Year and quarter	Week ending	Number of testers	Total hours	Average hours
A. 19xx—1	1-9	6	240	40
	1-16	6	276	46
	[etc. to]			
	4-3	10	400	40
Total				521
B. 19xx—2	4-10	15	660	44
	[etc. to]			
	7-3	18	576	32
Total				575

[Data are provided only to illustrate the pattern to follow. An actual specification would list the data for every week of every calendar quarter to the extent required by the maximum backpay period.]

4. During the backpay period, Respondent Company gave three general wage increases to all testers as follows:

March 1, 19xx	5 cents
August 6, 19xx	10 cents
July 1, 19yy	5 cents

5. Each of the discriminatees was entitled to $50 vacation pay in July of each year of the backpay period and $25 Christmas bonus in December of each year of the backpay period.

6. Calendar quarter net interim earnings is the difference between calendar quarter interim earnings and calendar quarter expenses.

7. Calendar quarter net backpay is the difference between calendar quarter gross backpay and calendar quarter net interim earnings.

8. The total net backpay due each discriminatee is the sum of the calendar quarter amounts of net backpay due him.

9. *Floyd A. Littlejohn*

A. Littlejohn's backpay period begins January 1, 19xx, and ends July 31, 19yy.

It is admitted that Littlejohn was unavailable for employment due to illness from February 1, 19xx, through February 7, 19xx.

B. Littlejohn's rate of pay immediately prior to the Respondents' unfair labor practices was $1.10 per hour. He would have been paid during the backpay period at the rates set forth below:

January 1, 19xx, through February 28, 19xx: $1.10 per hr.

March 1, 19xx, through August 5, 19xx: $1.15 per hr.

August 6, 19xx, through June 30, 19yy: $1.25 per hr.

July 1, 19yy, through July 31, 19yy: $1.30 per hr.

C. Littlejohn's gross backpay is that set forth in item 5 of Appendixes A-1 through A-7.

D. Littlejohn's expenses are those set forth in item 6 of Appendixes A-1 through A-7.

E. It is admitted that Littlejohn earned the amounts set forth in item 6 of Appendixes A-1 through A-7.

[See sec. 10624.1 for nondeductible interim earnings.]

10. *Susan Fine*

A. Susan Fine's backpay period begins January 1, 19xx, and ends December 31, 19yy.

It is admitted that Fine was unavailable for employment due to maternity leave from October 1, 19xx, through March 31, 19yy.

B. Fine's rate of pay immediately prior to the Respondents' unfair labor practices was $1 per hour. She would have been paid, during the backpay period, at the rates set forth below:

January 1, 19xx, through February 28, 19xx: $1 per hr.

March 1, 19xx, through August 5, 19xx: $1.05 per hr.

August 6, 19xx, through June 30, 19yy: $1.15 per hr.

July 1, 19yy, through December 31, 19yy: $1.20 per hr.

C. Fine's gross backpay is that set forth in item 5 of Appendixes B-1 through B-8.

D. Fine's expenses are those set forth in item 6 of Appendixes B-1 through B-8.

E. It is admitted that Fine earned the amounts set forth in item 6 of Appendixes B-1 through B-8.

[See sec. 10624.1 for nondeductible interim earnings.]

11. *Emma Lewis*

A. Emma Lewis' backpay period begins January 1, 19xx, and ends June 30, 19xx.

B. Lewis' rate of pay immediately prior to the Respondents' unfair labor practices was $1.25 per hour. She would have been paid, during the backpay period, at the rates set forth below:

January 1, 19xx, through February 28, 19xx: $1.25 per hr.

March 1, 19xx, through June 30, 19xx: $1.30 per hr.

C. Lewis' gross backpay is that set forth in item 5 of Appendixes C-1 through C-2.

D. Lewis' expenses are those set forth in item 6 of Appendixes C-1 through C-2.

E. It is admitted that Lewis earned the amounts set forth in item 6 of Appendixes C-1 through C-2.

[See sec. 10624.1 for nondeductible interim earnings.]

12. Summarizing the facts and calculations specified above, the obligation of the Respondents to make whole employees under the Board Order [and court judgment] will be discharged by payment to the employees named below of the amounts set opposite their names, plus interest accrued to the date of payment pursuant to such Order [and judgment], minus the tax withholding required by Federal and state laws:

Floyd A. Littlejohn	$1,000.00
Susan Fine	$1,290.50
Emma Lewis	$1,258.20

PLEASE TAKE NOTICE that on ____ day of _____, 19xx, at [hour and place of hearing] a hearing will be conducted before a duly designated administrative law judge of the National Labor Relations Board on the allegations set forth in the above specification, at which

time you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Section 102.54 of the Board's Rules and Regulations, the Respondents shall, within 21 days from the date of the specification, file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the specification [and where applicable add the following phrase:] and a copy thereof shall immediately be served on any other Respondent jointly liable. To the extent that such answer fails to deny allegations of the specification in the manner required under the Board's Rules and Regulations and the failure so to do is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondents shall be precluded from introducing any evidence controverting them.

Dated at New Orleans, Louisiana, this ____ day of _____, 19xx.

NATIONAL LABOR RELATIONS BOARD
By _____
Regional Director, Region 15

APPENDIX A-1

FORM NLRB-4722 (4-65) COMPUTATION OF BACK PAY										YEAR 19xx		QUARTER 1	
CASE NO. 15-CA-251; 15-CB-17										EXCEPTED PERIOD(S)			
NAME Littlejohn, Floyd A.			SOCIAL SECURITY NO. 000-00-0000							2/1/xx - 2/7/xx			
JOB TITLE AND DEPARTMENT Tester – Testing													
BACK PAY COMPUTATION FOR CALENDAR QUARTER:													
1. NUMBER OF (HOURS) DAYS OR WEEKS	279		203		—								
2. (HOURLY) DAILY OR WEEKLY RATE OF PAY	$ 1	10	$ 1	15	$ —								
3. PRODUCT (ITEM 1 X ITEM 2)	$ 307	00	$ 233	00	$ —								
4. BONUS AND OTHER									$				
5. QUARTERLY TOTAL GROSS BACK PAY												$ 540	00
6. QUARTERLY INTERIM EARNINGS AND EXPENSES						EARNINGS		EXPENSES					
A. Mfg. Co. - New Orleans, LA						200	00						
B. Garage - New Orleans, LA						100	00						
Union dues, United Garage Workers								5	00				
[Note: (This is not part of the sample computation.) Although there is an excepted period of 1 week in this quarter when no gross backpay was computed for Littlejohn, his interim earnings in the quarter have been prorated (see item 10600.1) as the reason for the exception (illness of week of 1 week) presumably affected his interim employment. If it has not, there would not be an excepted period.]													
					TOTALS	$ 300	00	$ 5	00				
7. QUARTERLY NET INTERIM EARNINGS												$ 295	00
8. NET BACK PAY FOR QUARTER (Item 5 minus Item 7)												$ 245	00
9. INTEREST (See Note below)	FROM		THROUGH		No. days					$ interest			
10. TOTAL NET BACK PAY PLUS INTEREST (Item 8 plus Item 9)										$			

NOTE: Interest will not be computed, usually, until a tender of the backpay due has been made or a date for payment has been agreed upon, since interest accrues until that date.

[Appendixes A-2 through A-7 not included: A-1 provided as pattern.]

APPENDIX B-1

FORM NLRB-4312 (8-65) COMPUTATION OF BACK PAY

YEAR: 19zz | QUARTER: 1

CASE NO. 15-CA-251; 15-CB-17

NAME: Fine, Susan | SOCIAL SECURITY NO. 000-00-0000

JOB TITLE AND DEPARTMENT: Tester—Testing

EXCEPTED PERIOD(S): None

BACK PAY COMPUTATION FOR CALENDAR QUARTER

1. NUMBER OF (HOURS) DAYS OR WEEKS	318	203	—	
2. (HOURLY) DAILY OR WEEKLY RATE OF PAY	$ 1 00	$ 1 05	$ —	
3. PRODUCT (ITEM 1 X ITEM 2)	$ 318 00	$ 213 00	$ —	
4. BONUS AND OTHER			$ —	
5. QUARTERLY TOTAL GROSS BACK PAY				$ 531 00

6. QUARTERLY INTERIM EARNINGS AND EXPENSES	EARNINGS	EXPENSES
D. Mfg. Co. Baton Rouge, LA	200 00	
E. Mfg. Co. New Orleans, LA	150 00	
Bus Transportation New Orleans, LA, to Baton Rouge, LA		6 00
Bus Transportation Baton Rouge, LA, to New Orleans, LA		6 00
Employment agency fee		15 00
TOTALS	$ 350 00	$ 27 00

7. QUARTERLY NET INTERIM EARNINGS		$ 323 00
8. NET BACK PAY FOR QUARTER (Item 5 minus Item 7)		$ 208 00
9. INTEREST (See Note below) FROM ____ THROUGH ____	No. days	$ Interest
10. TOTAL NET BACK PAY PLUS INTEREST (Item 8 plus Item 9)		$

NOTE: Interest will not be computed, usually, until a tender of the backpay due has been made or a date for payment has been agreed upon, since interest accrues until that date.

[Appendixes B-2 through B-8 not included; B-1 provided as pattern.]

APPENDIX C-1

FORM NLRB-4213 (8-85) COMPUTATION OF BACK PAY

YEAR: 19zz | QUARTER: 1

CASE NO: 15-CA-251; 15-CB-17

EXCEPTED PERIOD(S): None

NAME: Lewis, Emma | SOCIAL SECURITY NO: 000-00-0000

JOB TITLE AND DEPARTMENT: Tester - Testing

BACK PAY COMPUTATION FOR CALENDAR QUARTER

1. NUMBER OF (HOURS) DAYS OR WEEKS	318	203	——
2. (HOURLY) DAILY OR WEEKLY RATE OF PAY	$ 1 25	$ 1 30	$ ——
3. PRODUCT (ITEM 1 X ITEM 2)	$ 398 00	$ 264 00	$ ——
4. BONUS AND OTHER			$ ——
5. QUARTERLY TOTAL GROSS BACK PAY			$ 662 00

6. QUARTERLY INTERIM EARNINGS AND EXPENSES	EARNINGS	EXPENSES
A. Mfg. Co. New Orleans, LA	300 00	
B. Service Co. New Orleans, LA	100 00	
TOTALS	$ 400 00	$

7. QUARTERLY NET INTERIM EARNINGS	$ 400 00
8. NET BACK PAY FOR QUARTER (Item 5 minus Item 7)	$ 262 00
9. INTEREST (See Note below) FROM ____ THROUGH ____ No. days	$ Interest
10. TOTAL NET BACK PAY PLUS INTEREST (Item 8 plus Item 9)	$

NOTE: Interest will not be computed, usually, until a tender of the backpay due has been made or a date for payment has been agreed upon, since interest accrues until that date.

[Appendix C-2 not included; C-1 provided as pattern.]

10656.15 *Sample of Specification With Computation in Text:* In the more complex cases, when varying circumstances, pay rates, job classifications, and backpay periods must be considered, it may be helpful to set forth a separate specific computation with separate allegations in the text rather than to attach Form NLRB-4312 for each discriminatee as in the sample that follows. In using this format, the description of the basic method of computing gross backpay with supporting tabulations must be noted in a prior section of the specification, while the name of each discriminatee should be preceded by a numeral or letter (as appropriate in accordance with the outline being used for the specification as a whole) so that the denials, admissions, or explanations of the respondent's answer may be keyed to the specification as expeditiously as possible.

I. *Boyd, Alvy*

a. Boyd's backpay period begins February 13, 19xx, and ends July 25, 19xx.

b. Boyd was employed in the job classification "mechanic repairman" at the pay rate of $1.10 per hour prior to discrimination.

c. It is admitted that his interim employment and earnings are as follows, and it is alleged his expenses are as follows: [see sec. 10624.1 for nondeductible interim earnings]

Calendar quarter	Remarks	Interim earnings	Expenses
19xx—1	Unemployed	None	
	Transportation seeking work		$6.00
19xx—2	Self-employed	$262.50	
	Transportation seeking work—$4		
	Transportation to and from work—$22.50		26.50
19xx—3	Self-employed	87.50	
	Transportation to and from work		7.50

d. Boyd's gross and net backpay by calendar quarters is set forth below.

Calendar quarter	Hours and pay rates	Gross backpay	Net backpay	
19xx—1	321 at $1.10	$353.10		$353.10
19xx—2	616 at $1.10	677.60	$236.00	441.60
19xx—3	145 at $1.10	159.50	80.00	79.50

10658–10664 *Other Pretrial Procedures*

10658 *Procurement of Hearing Date:* The procedures of section 10258 should be followed, substituting "Backpay Specification" for "Complaint" except for the last paragraph of that item, which does not apply to backpay proceedings.

10660 *Service of Backpay Specifications:* A copy of the backpay specification and notice of hearing should be served on each respondent and on the charging party by registered mail as soon as possible prior to the hearing, but at least 21 days before the date set for the hearing. (See Sec. 102.52 of Rules and Regulations.)

10662 *Notice to Discriminatees:* The discriminatees should be notified of the hearing by letter and advised that they will be called for interview and possibly subpoenaed for testimony during a specific period when the trial attorney and/or compliance officer will be in the area of the hearing for that purpose.

10663 *Disclosure of Factual Information Relevant to the Compilations:* It is the policy of the Board that, on request made by the respondent after the issuance of the backpay specification or of the notice of hearing without specification, factual information in documents obtained or prepared by the Regional Office, which is relevant to the computation of the net backpay, including search for employment or availability for employment, or other forms of reimbursement, shall be made available.

10663.1 *Scope of Disclosure:* The disclosure policy extends only to factual information contained in documents in the possession of the Regional Office. The standard of disclosure is all such information relevant to the computation of the net backpay or to other items of reimbursement or restitution. Under that standard, disclosure should be made of the documents supporting such computations. All affidavits or other documents concerning discriminatee interim employment, search for employment, or availability for employment should be made available for inspection and copying. As the disclosure policy pertains only to backpay or related computations, it does not require disclosure of information relating to other issues, such as successor employer, joint employer, or alter ego.

10663.2 *Time and Form of Disclosure:* Disclosure prior to issuance of a notice of hearing with backpay specification, or of a notice of hearing without specification, is not required. Requests for disclosure prior thereto should be refused, unless the Regional Director determines that disclosure in advance of issuance of a notice of hearing of that information, which would be available to the respondent upon request after issuance of a notice of hearing, will significantly enhance possibilities of settlement. The disclosure obligation will normally be satisfied by making the materials available for inspection and copying. It should be made clear to persons requesting the information that it is not routine public information, and it is to be supplied only for use in the proceeding.

10663.3 *Materials That Need Not Be Disclosed:* Because the policy extends only to factual information relevant to the computation of net backpay, disclosure is not required to the extent documents contain information reflecting (a) deliberative or policymaking processes of the agency, (b) the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, or other information that would not normally be available to a party in private litigation, (c) the identification of confidential sources of information to the agency, or (d) intimate details of a personal nature having only slight relevance to the backpay inquiry.

10664 *Analysis and Response to Respondent's Answer:*

10664.1 *No Answer Filed:* (See Board's Rules and Regulations, Sec. 102.54.) Sections 10290 and 10292 should be followed in filing motions. (When the Region issues only notice of hearing without backpay specification, no answer is required.) If the respondent fails to file an answer within the time allowed, the trial attorney should communicate in writing with the respondent's counsel or, if he has none, with the respondent, advising that no answer has been filed in accord with the Board's Rules and Regulations, and that if an answer is not filed within a certain period of time (normally not to exceed 1 week from date of written communication), the General Counsel will file a motion for summary judgment with the Board. If the answer is not filed within the applicable deadline, the trial attorney should file a motion for summary judgment with the Board and obtain an order postponing hearing indefinitely.

10664.2 *Failure of Specificity in Answer; Motion to Preclude:* If the respondent's answer is not specific as to matters within its knowledge, a motion should be made that the administrative law judge deem all such matters admitted without the taking of evidence supporting the specification's allegations and preclude the respondent's offering any evidence on such issues (Rules and Regulations Section 102.54(c)). The necessary legal research and drafting of the motion papers, showing in detail in what respects the answer of the respondent is defective, are done well in advance of the hearing. (See also sec. 10737.3.)

10664.3 *Proper Answer Filed; Allegations Not Specifically Denied:* The answer should be analyzed carefully comparing it point by point with the specification and the points not answered specifically, or admitted, should be noted. The field attorney should not go to proof on any of these points and should make appropriate objection if the respondent makes an attempt to bring such matters into the hearing.

10670–10674 *Procedures Common to Pretrial and Trial Situations*

10670 *Complaint Case Procedures Generally Applicable:* The procedures and trial techniques noted in sections 10267 through 10452 covering formal proceedings in complaint cases should be followed except where they are inconsistent with this manual, the Rules and Regulations, or are otherwise inappropriate or inapplicable. Also, Sections 102.52 through 102.59 of the Board's Rules and Regulations should be carefully read and observed.

10672 *Amendment of Backpay Specifications:* Section 102.57 of the Board's Rules and Regulations permits the Regional Director to amend the specification after the issuance of the notice of hearing and prior to the opening of the hearing at his/her discretion, and after the opening of the hearing on leave of the administrative law judge or the Board for good cause. One copy of any amendment should be sent to the Division of Operations Management, only when substantial or significant amendment is involved.

10674 *Withdrawal of Specification Upon Compliance:*

10674.1 *Before Hearing:* On compliance or settlement, the Regional Director may withdraw the backpay specification or notice alone on receipt of the backpay if the criteria of section 10629 are met. There is no need for a formal settlement agreement when money is the only issue unless the money is not to be paid immediately. If the criteria of section 10629 are not met, a copy of the settlement should be sent to the Division of Operations Management with a request for approval before it is accepted and the specification withdrawn.

10674.2 *At Hearing But Before Transfer of Case to Board:* Withdrawal at this stage is to be performed in the same manner as above except that it should be subject to the granting of leave by the administrative law judge.

10674.3 *After Transfer of Case to Board:* Settlement agreements obtained at this stage will be transferred to the Board for its consideration.

10714–10722 *Trial Preparation*

10714 *Generally:* The provisions of sections 10330-10352 should be followed except when they are inconsistent with this manual, the Rules and Regulations, or are otherwise inappropriate.

10714.1 *Numerous Discriminatees; Assignment of Additional Counsel:* In cases involving many discriminatees, it may be advisable to have two trial counsel assigned so the flow of witnesses may be uninterrupted and each discriminatee may be interviewed or may have recollection refreshed immediately before taking the stand.

10714.2 *Pretrial Stipulations and Arrangement for Production of Records:* The trial attorney should subpoena or make reliable advance arrangements for the production of records necessary to proof of basic backpay data. Every effort should be made to obtain factual stipulations concerning matters contained in the gross employer's records or matters that are not subject to controversy. The exploration of possible stipulations or requests for the production of the respondent's records should not be left for handling at the hearing. When the hearing opens, the attorney should be ready to place stipulations in the record and to proceed with proof.

10716 *Preparation of Testimony and Evidence Concerning Gross Backpay Computation*

10716.1 *Testimony of Compliance Officer:* If the backpay computation as contained in the backpay specification is placed in issue by the answer and is not completely self-explanatory and easily comprehensible, the compliance officer should be prepared to testify concerning this and should restudy the basis of the computation and the reasoning in selecting and implementing the gross backpay formula so that they can be described succinctly and in as simple language as possible. The compliance officer should also prepare to criticize any alternative computation offered by the respondent.

The compliance officer should also be prepared to undergo cross-examination and will usually be forewarned of the areas of such cross-examination by prior discussions with the respondent's counsel.

10716.2 *Preparing Supplementary Tabulations; Explaining Computation; Answering Defenses:* If specific complex portions of the gross

backpay computation are difficult to understand by themselves, supplementary tabulations or exhibits may be compiled in preparation for the hearing to be introduced into evidence simultaneously with the compliance officer's testimony describing the reasoning in reaching the conclusions contained in the specification.

For instance, if it is contended by the General Counsel and opposed by the respondent that a specific raise in pay would have been received by the discriminatees during the backpay period, a summation of data from the gross company's records, showing the employees who received such a raise and its amount and time of payment, may form an exhibit.

Similar tabulations to prove that bonuses were paid, that the discriminatees would have been transferred to other departments, that they would not have been reached in layoffs, that they would have been reemployed at a specific date following a layoff during the backpay period, etc., should be prepared.

Although from necessity prepared in advance of the hearing, tabulations rebutting matters of defense need not be proffered during the General Counsel's case.

10716.3 *Testimony of Discriminatees:* Occasionally, also, the trial attorney may prove the gross backpay through testimony of discriminatees or other persons (including other employees of the gross employer) who have knowledge of matters alleged in the specification and properly denied in the answer, such as the names of employees who replaced a discriminatee in a particular job, determination of eligibility for fringe benefits, and similar elements of gross backpay.

10716.4 *Testimony and Evidence Concerning Expenses:* Expenses incurred by discriminatees in seeking and holding interim employment are deductible from their interim earnings and are the second item on which the General Counsel has the burden of proof in a backpay proceeding. In many cases the discriminatees do not have documentary evidence of these expenses, but they may be proved through testimony. The trial attorney usually interviews the discriminatees who have had expenses of the above nature a few days in advance of the hearing to refresh their memories with reference to the facts on which these expenses are claimed and to review the basis on which estimates of them have been made. Occasionally, it may be necessary to amend the specification to include items of this nature that have been omitted

through inadvertence or lack of opportunity to interview the discriminatee.

10718 *Preparation of Discriminatees for Examination on Respondent's Defense Issues:* It may reasonably be expected that the respondent's counsel will wish to examine certain discriminatees concerning their efforts to seek work during periods of unemployment. In anticipation of this eventuality, and to make sure that a concise and clear record of such discriminatees' interim employment and earnings is made, each such discriminatee should be interviewed in advance, but as close as possible in time to the date when testimony must be given, so that the discriminatee's memory is refreshed concerning the details of interim employment, earnings, expenses, and search for work. Although much of this information is not within the General Counsel's burden of proof, the discriminatees should be prepared for it so that the record will be as clear and concise as possible. Note, however, that the respondent may not go into the matter unless it is raised in its answer.[1]

The discriminatees should have an opportunity to review their employment histories as shown in the social security report, and the manner in which they obtained such interim employment (to refresh recollection in the search for work area), and their memories should be refreshed concerning the dates of their interim employment, the names of their interim employers, periods of unemployment, and the details of their search for work. These are matters on which the respondent's counsel may examine them at the hearings.

The discriminatees should be prepared to state, as precisely as their memories may allow, the names of the firms they canvassed in applying for work, the times when they made such applications, the people to whom they spoke, and whether or not they filed written applications. Whenever possible, an inquiry should be made concerning the existence of corroborative witnesses to their search for work. Such corroboration is invaluable particularly when lengthy periods of unemployment are involved.

Their periods of application at state employment services for unemployment compensation should be reviewed with them and proof of such applications as are available, including their unemployment compensa-

[1] E.g., *Southland Mfg. Corp.*, 193 NLRB 1036 fn. 3 (1971), enfd. 475 F.2d 414, 417 (D.C. Cir. 1973), cert. denied 414 U.S. 858 (1973).

tion booklets noting the times when they applied for unemployment compensation, should be prepared for introduction into evidence.

All discriminatees should be cross-examined as a test and in preparation for the kind of cross-examination they will receive at the hearing, particularly concerning their efforts to find work during periods of unemployment and low earnings. It should be stressed that the truth and only the truth should be the basis of their testimony. They should be advised that if they engage in falsehood, they will prejudice their case.[2]

10720 *Testimony Concerning Labor Market Conditions; Preparation For:* In many cases, questions are raised by the respondent concerning the search for work by the discriminatees. The respondent may call expert witnesses familiar with the labor market in the area where most of the discriminatees were living and seeking work during the backpay period. In preparation for both cross-examination and rebuttal, the trial attorney should interview knowledgeable local officials of the state employment service and knowledgeable union officials, particularly skilled trades unions and/or unions operating hiring halls, to obtain a thorough grounding on how local market conditions affected the search for work of people with the skills and experience of the discriminatees. Another valuable source of information is the Area Trends in Employment and Unemployment Bulletin published monthly by the Manpower Administration of the U.S. Department of Labor.

The respondent's witnesses may be expected to testify concerning the number of job vacancies that existed in the employment area during the backpay period. The trial attorney, on the basis of pretrial interviews, should be prepared to elicit testimony concerning not only the number of job vacancies that occurred, but the number within the job experience and background of the discriminatees, the rates of pay offered, and the number of people remaining unemployed on the rolls of the state employment service or union simultaneous with the existence of the job openings.

10722 *Service of Subpoenas:* The presence in the hearing room of the records of the gross company (whether or not it is a respondent), upon which the gross backpay computation was based, should be assured by the service of a subpoena duces tecum on such company

[2] *American Navigation*, 268 NLRB 426 (1983); *Ad Art*, 280 NLRB 985 (1986); and cases cited therein.

before the opening of the hearing. Section 10340 should be followed. Thus, if the gross backpay is challenged at any point, supporting evidence will be available and appropriate portions may be demonstrated or copied for introduction into evidence. This is not necessary if the gross backpay computation is admitted by the respondent.

10728–10746 *Conduct of the Backpay Hearing*

10728 *Complaint Case Procedures Generally Applicable:* Sections 10380–10428 of the Unfair Labor Practices Manual dealing with hearings are generally applicable to backpay hearings except when they are inconsistent with this manual, the Rules and Regulations, or are otherwise inappropriate. See also provisions concerning procedures common to pretrial and trial situations, sections 10670–10674, supra.

10739 *Formal Exhibits:* At the outset of the hearing, the trial attorney should introduce into evidence the following papers:

Board Decision and Order
Court decision and judgment
Backpay specification and notice of hearing
Notice of hearing
Each written postponement request and order
Affidavits of service
Respondent's answer and affidavit of service
Form NLRB–4688, Statement of Standard Procedure in Formal Hearing

Relevant stipulations or correspondence relating to proceeding to a backpay hearing before enforcement proceedings or on a notice of hearing without specification should also be introduced.

10731 *Opening Statement:* In the opening statement the trial attorney should normally state the factual and legal theory of the case if it is not otherwise apparent, as well as the theory of the burden of proof in backpay cases (secs. 10737.2 and 10740.1). Additionally, the trial attorney should present to the administrative law judge the problem of missing, distant, unavailable, and deceased witnesses (secs. 10734, 10735, and 10736); clear up the problem of the use of the discriminatees as the respondent's witnesses; and reasonably cooperate in their production as provided in section 10733.

10732 *Introduction of Documentary Evidence Showing Interim Earnings:* If the respondent's counsel agrees, the social security reports, Railroad Retirement Board (RRB) reports, and letters from interim employment and earnings should be offered or proffered to the respondent's counsel to offer.

The trial attorney should be careful to state on the record that although the General Counsel does not have the burden of proving interim employment and earnings and that this is the respondent's burden, an offer is being made of documentary information of such matters in the interests of accuracy, to expedite the hearing, and as part of the General Counsel's policy to offer as much assistance as possible to the respondents in presenting information relevant to backpay issues for the consideration of the administrative law judge. The shortcomings of the social security report should be described, e.g.:

a. Earnings over the maximum in any year are not listed (see sec. 10649.1).

b. Earnings from farm and other uncovered employment are not shown.

c. Data processing mistakes, inclusion of irrelevant earnings (e.g., relating to portions of calendar quarters outside backpay period: see secs. 10604.2 and 10606), etc., introduce possibility of error.

d. Some interim employers may not have reported earnings.

e. Earnings for about 6 months prior to the time the request for the report was made are not included therein.

Copies of such reports, letters from employers, etc., that the trial attorney proposes to introduce normally have been provided the respondent's counsel in advance of the hearing, if circumstances permit (but *after* its answer has been received). If the respondent refuses to agree to the admission of such exhibits, the offer should nevertheless be made on the record but no effort should be made to have them admitted over its objection unless it is indicated by the administrative law judge that they would be helpful. Irrespective of whether the evidence is received, the trial attorney should make clear on the record that the evidence on interim earnings was made available to the respondent in advance of hearing, as is usually the case.

10733 *Discriminatees as Witnesses for Respondent:* It is usually not necessary for the General Counsel to call all or even any discriminatees as witnesses (sec. 10740.1). The respondent, however, will often need or desire to call some or all of the discriminatees. In such circum-

stances, the trial attorney should cooperate with the respondent in its efforts to obtain the presence of the discriminatees.[1] Trial counsel should cooperate to the extent that it is practicable and reasonable to do so, and the record should reflect this fact and all details of the cooperation proffered, whether it occurred before or at the hearing.[2] Thus, the trial attorney should furnish the desired discriminatee's present or last known address so that individual may be subpoenaed or located. Should the discriminatee object to revealing this information for apparently good cause, that individual may properly be asked to voluntarily waive formal service (but not fees and mileage) so long as it is agreed that testimony will be given at the time requested by the respondent. Should failure to accept service tend to prolong or delay the proceedings, the discriminatee's location should no longer be treated as confidential unless the most compelling reason exists therefor.

To avoid the possibility of delay at the hearing, it is good practice, if possible and practicable, to explore the problem of discriminatee witnesses with the respondent's counsel in advance of the hearing and it is of the utmost importance that the record reflect in the most detailed factual terms the cooperation proffered the respondent and the fact that discriminatees were available to it as witnesses.[3] To this end, the trial attorney should state, preferably in the opening statement, past offers and efforts of cooperation, as well as continued willingness to cooperate by the procedures herein outlined or other reasonable methods, and should elicit from the respondent its desires in the matter. Before the hearing closes, counsel should summarize on the record all the respondent's requests for testimony by discriminatees and the result of counsel's efforts at cooperation, lest it be subsequently claimed that the respondent was prevented from proving its defense. To the same end a more liberal attitude should be displayed toward depositions (not expected to raise credibility issues) and moving the hearing to the location of distant witnesses. See also instructions concerning missing, deceased, distant, and otherwise unavailable discriminatees (secs. 10734–10736).

10734 *Missing Discriminatees:* The trial attorney should point out to the administrative law judge the names of the discriminatees who are missing and for whom no interim earnings information is available. The administrative law judge should be requested to make a finding

[1] E.g., *Cornwell Co.*, 171 NLRB 342 fn. 2 (1968): "the General Counsel's function in producing backpay claimants for examination by Respondent is merely advisory and cooperative."
[2] E.g., *Florence Printing Co. v. NLRB*, 376 F.2d 216, 223 (4th Cir. 1967), cert. denied 389 U.S. 840.
[3] *Florence Printing Co. v. NLRB*, supra.

about gross backpay for these persons so that when they are located and their interim earnings ascertained, they will be compensated accordingly, either by agreement between the Board and the respondent, or following a further backpay hearing as to them, if there is any question concerning search for work, etc., which cannot be resolved informally.[1] See sections 10644, 10648.5, and 10656.10.

If interim earnings are available for missing discriminatees, they should be treated as others, the burden of proving further offsets to backpay resting on the respondent.

10735 *Distant and Unavailable Discriminatees:* The trial attorney should also raise at the outset of the hearing known problems of distant and unavailable witnesses. If their testimony is not necessary to the General Counsel's case and their testimony is desired by the respondent, the procedures set forth in section 10733 may be followed. Otherwise, the trial attorney should propose following the procedure for missing discriminatees contained in section 10734, taking depositions (if credibility issues do not seem likely to become involved) or moving the hearing, arguing in support of the procedure proposed that the wrongdoer rather than the injured party should bear the inconvenience and cost of travel, which may seriously diminish the backpay claim or exceed it.

10736 *Deceased Discriminatees; Suggested Procedure:* In the case of deceased discriminatees, the trial attorney should state the problems to the administrative law judge (normally at the outset of the hearing and/or in the opening statement). Thereafter the trial attorney should offer evidence of gross backpay and expenses to the extent required if the respondent's answer has put these elements of the deceased discriminatee's claim in issue. Thereafter, by reference to the appropriate portion of the backpay specification, the trial attorney should concede what the amounts of interim earnings that are admitted are to be deducted from the backpay claimed due and the amount of net backpay. If it is deemed necessary, the trial attorney may proffer the documents upon which these admissions are based although in the usual case copies of them have already been made available to the respondent, so that normally it may be left to the latter to make the

[1] E.g., *Brown & Root, Inc.*, 132 NLRB 486, 495–497 (1961); and see 327 F.2d 958, 958–959 (8th Cir. 1964), clarifying court's opinion in 311 F.2d 447, 456 (1963), on this point. See also *Patrick F. Izzi Trucking Co.*, 162 NLRB 242, 260–261 (1961), remanded on reinstatement issue 395 F.2d 241 (1st Cir. 1968).

proffer as part of its case on mitigation if deemed necessary. Usually, unless the respondent intends to present evidence of additional interim earnings, the admissions of interim earnings in the specification will be sufficient.

10737 *Special Considerations Affecting Trial of Backpay Proceedings:*

10737.1 *Generally:* The trial of a backpay proceeding is governed in large part by the law establishing the burden of proof and Section 102.54 of the Rules and Regulations, which requires that the respondent raise its defenses in its answer.

10737.2 *Burden of Proof:* The principal affirmative burden of the General Counsel in backpay cases is to prove the validity of the gross backpay computation. The second burden is the proof of expenses incurred by the discriminatees in seeking or maintaining interim employment. This latter element is normally not greatly remunerative to the discriminatees, although, in some cases, substantial claims have the salutary effect of supplementing other evidence concerning the discriminatee's search for work. Thus, testimony concerning expenses incurred in making trips for the purpose of obtaining employment tends to support the discriminatee's contention that a reasonable search for work was made.

All the other elements of the backpay case, e.g., interim employment and earnings, whether discriminatee was willfully idle or otherwise unavailable for work during the backpay period, etc., which tend to diminish the obligation of the respondent, are rightfully its burden to prove. However, in view of the fact that the Board is in a position to assist in obtaining information concerning these matters, it is the General Counsel's policy to make available evidence, insofar as possible, concerning interim employment and admit earnings in periods when the discriminatees were unavailable for work because of illness, confinement in institutions, etc., but not periods of willful loss (see secs. 10622 and 10656.9). However, except when some advantage is to be gained thereby, it is not the General Counsel's policy to assume the respondent's burden of proof and attempt to establish that there are no facts in mitigation; i.e., that the discriminatee made a search for interim employment and/or did not engage in other conduct that would reduce backpay entitlement.

10737.3 *Specificity of Answer:* The backpay specification summarizes the regional computation of (a) the discriminatee's entitlement in actual dollars and cents and (b) the premises on which such computation is based. Section 102.54(b) of the Rules and Regulations provides that, if the respondent disputes the accuracy of the figures or the premises on which they are based, the answer shall specifically state the basis for disagreement, setting forth in detail its position as to the applicable premises and furnishing the appropriate supporting figures. Absent such a denial or an adequate explanation therefor, the allegation is deemed to be admitted and the respondent is precluded from controverting the allegation of the specification. The trial attorney should be fully familiar with the cases requiring that defenses must be raised in the pleading.[1] (See also sec. 10664.2.)

10737.4 *Trial Technique:* It is a cardinal rule of advocacy in backpay proceedings that the trial attorney should not assume any part of the burden that the law allocates to the respondent itself or litigate issues not fairly placed in issue by the answer, at least unless some gain to the case is achieved thereby. It will be most rare where litigating defenses not properly raised will aid the General Counsel's case. Trial counsel therefore should completely familiarize themselves with the case law arising under Section 102.54(b) of the Rules and Regulations and be vigilant that no defenses not properly raised are placed in litigation at the hearing, should oppose all efforts to do so, and should not do so themselves. Additionally, although they may proffer evidence in areas in which the respondent has the burden of proof, they should not only disavow in express words, but should take particular care that by their conduct they do not place themselves in the position that they have assumed the burden of proof in areas that are properly the respondent's responsibility.

10738 *Testimony and Evidence Concerning Gross Backpay:* In cases involving relatively complex computations of gross backpay, the testimony of the compliance officer (see sec. 10716.1) who prepared the computation is usually extremely helpful to the administrative law judge and presents a frame of reference for the introduction of supplementary exhibits.[1]

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[1] E.g., *Southland Mfg. Corp.*, 193 NLRB 1036 fn. 3, 1038 (1971), enfd. 475 F.2d 414, 416–417 (D.C. Cir. 1973). But note that the Board will not be unduly technical in this regard and will permit a respondent to present evidence of willful loss though its answer only controverted amounts of interim earnings. *Garrard Convalescent Home*, 220 NLRB 450 fn. 4 (1975).

[1] E.g., *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, 151 NLRB 972, 981–986 (1965).

In addition to describing the basis of the computation, the compliance officer should tell how to adjust the computation of backpay in the event the administrative law judge finds the entitlement of backpay of some discriminatees changed on the basis of evidence introduced at the hearing.

If the respondent has properly alleged in its answer that the specification's gross backpay formula is incorrect or inappropriate, etc., it will have set forth, with supporting data, an alternative method for computing gross backpay. The compliance officer should present testimony concerning the defects of the respondent's approach.[2] Alternatively, this may be relegated to argument by the trial attorney or included in a brief.

Occasionally, as for example when the issue raised is the representative character of the employees used to measure gross backpay, the testimony of discriminatees or other employees may be helpful, and in the fringe benefit area the documents themselves (insurance policies, pension plans, etc.) and employment and payroll records may be the best evidence of a discriminatee's entitlement to fringes such as vacations, bonuses, insurance, and health, welfare, and pension benefits.

10740 *Testimony of Discriminatees*

10740.1 *Generally:* The General Counsel's burden of proof is normally met by the introduction of evidence and testimony bearing on gross backpay, reimbursable "fringe" benefits, and discriminatees' expenses. In the usual case the respondent's answer will not put the amounts claimed for gross backpay (including fringe benefits) in issue, in which case testimony relating thereto by the discriminatees (or compliance officer) is not needed. Hence, field trial attorneys should place discriminatees on the stand in the following circumstances only:

a. To prove expenses

b. Facts necessary to the computation of gross backpay that cannot be established by records (e.g., improper reinstatement)

c. When other advantage to the Government's case results.

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[2] E.g., *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, supra, 151 NLRB at 987–988.

10740.2 *Search for Work and other Mitigation Issues:* Under some circumstances, however, the trial counsel may decide, when a respondent's answer has raised the search for work issue, that an orderly presentation of the facts on mitigation overrules the considerations set out in section 10737.4 and that it is advisable to put a discriminatee on the stand to testify on the latter's search for work rather than wait for the respondent to raise the issue with the witness. If such a judgment is made, the examination of the discriminatee should be limited to the specific period or periods as to which the mitigation issue has been raised by the answer.[1] The trial counsel should not take the discriminatee through a complete history of the latter's interim employment. After the discriminatee has been examined by the respondent (and this applies also to the normal situation when the examination has been initiated by the respondent), then, if in trial counsel's judgment it will tend to rebut any willful loss inferences that might result from the respondent's examination, trial counsel may adduce evidence of jobs actually secured and held by the discriminatee during the backpay period.

10740.3 *Testimony Concerning Expenses Incurred in Connection With Interim Employment:* The discriminatee should testify in detail concerning expenses incurred in seeking and maintaining interim employment. When daily transportation expenses to and from the plant of the interim employer are claimed, the discriminatee should testify concerning the amount that was spent in similar travel at the gross company. The discriminatee is entitled only to the difference between the two figures if interim employment expenses were higher.

Transportation and other expenses incurred in seeking work such as employment office fees should be pointed up in the testimony of the discriminatees as these serve to support testimony of the discriminatees' search for work. Because expenses are not deductible from interim earnings, during quarters when no interim earnings were received by the discriminatee, expenses have relevance only insofar as they support testimony of the discriminatee's search for work.

10740.4 *Examination Following Respondent's Inquiry Into Search for Work:* Discriminatees must have made a reasonable search for work during all periods of unemployment in order to be entitled to backpay. Each period of the discriminatee's unemployment should be thoroughly

[1] E.g., *Southland Mfg. Corp.*, 193 NLRB 1036, fn. 3, 1038 (1971), enfd. 475 F.2d 414, 416–417 (D.C. Cir. 1973).

canvassed concerning a search for work when the witness is questioned on this subject by the respondent. The names of firms to which the discriminatee applied, whether or not written applications were filed, whom the witness saw when application was made, etc., should be brought out.[2] The discriminatee should be asked if friends and relatives were notified of the former's need for employment and, if work was applied for in the company of friends, their names should be obtained. If the witness' credibility is subsequently impaired or impugned, the friends or relatives should be brought to the stand to corroborate the discriminatee's testimony. The discriminatee's cards bearing the dates of state employment service registration should be introduced in evidence if available. The above procedure requires pretrial preparation on the search for work issue whenever it is properly raised in the pleadings whether the discriminatee is called as the General Counsel's or as the respondent's witness. When not properly raised, examination on the subject should be objected.[3]

10740.5 *Respondent's Effort To Bar Reinstatement or Disparage or Discredit Discriminatees:* The respondent will often attempt to show something shameful in the background of the discriminatee as a basis for its contention that, in the absence of a Board order, the discriminatee would not have been retained in the employment of the gross company and, therefore, the Board should not order payment of backpay to the employee.

This may be countered primarily through a complete knowledge in advance of the discriminatee's side of the case. Thus, if the discriminatee had been in an institution or in jail at any time during the backpay period, or even prior to the backpay period, that side of the case should be known in advance and presented on rebuttal.

Another aspect of defending against this type of attack is to investigate the possibility that other people with like or even worse records continued in the employ of the gross company or that prior to the discrimination the respondent was aware of the misconduct and did not discharge the discriminatee.

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[2] E.g., *Golay & Co.*, 184 NLRB 241, 244 (1970), enfd. 447 F.2d 290 (7th Cir. 1971).

[3] E.g., *Southland Mfg. Corp.*, 193 NLRB 1036 fn. 3, 1038 (1971), enfd. 475 F.2d 414, 416–417 (D.C. Cir. 1973). But see *Garrard Convalescent Home*, 220 NLRB 450, 452 (1975), for necessity of putting in rebuttal testimony if the objection is overruled.

Additionally, it should be borne in mind that although absent a Board order an employer may discharge an employee for any reason or none save the employee's protected activities, once an employee has been discriminated against or once the employer has been ordered to reinstate the employee with backpay, the discrimination must be remedied and the order must be complied with absent sufficient cause to convince the Board or the courts that the discrimination or the Board order should be ignored. Thus, when the claim of misconduct is made in compliance proceedings there is an entirely different criteria of what justifies denial of reinstatement and backpay and an entirely different judge. When the problem arises, the trial attorney should be completely familiar with the line of cases in which the Board has refused to deny reinstatement to employees found by the Board to be discriminated against for protected activities because of some misconduct they engaged in that was unrelated to their discharge, as well as the cases dealing with the unavailability of such a defense to the right of reinstatement if it could have been raised at the time of the unfair labor practice hearing.[4]

10740.6 *Discriminatee's Decision Not To Return To Work:* The respondent's counsel, in cross-examining the discriminatees, will often attempt to elicit testimony to the effect that the discriminatees would not have returned to work at the gross company by asking them whether they would actually have accepted reinstatement during the backpay period. Objection should be made to such a question on the grounds it is hypothetical. Further, the Board has found to be irrelevant the evidence that at some time prior to an offer of reinstatement, discriminatees have stated that they would not return to work. This is true whether such statements were made in the context of settlement discussions regarding a complaint issued by the General Counsel or during compliance discussions pursuant to a Board order.[5]

However, the Board has ruled in a number of cases that the testimony of the discriminatee stating that at some time prior to the offer of reinstatement *the witness' mind was actually made up* not to return to work at the gross company is sufficient to toll backpay as of the time this intention was formed. The question, "Didn't you make up your mind that you would not return to work at the _____ company?" is a proper question and, if the discriminatee testifies that the decision

[4] E.g. *Fibreboard Paper Products Corp.*, 180 NLRB 142, 149 (1969), enfd. 436 F.2d 908 (D.C. Cir. 1970), rehearing Jan. 18, 1971, cert. denied 403 U.S. 905.

[5] *Heinrich Motors*, 166 NLRB 783, 785 (1967); *Lyman Steel Co.*, 246 NLRB 712 (1979).

was made at some time during the backpay period, the Board will probably toll backpay as of that time.

In preparing the discriminatee for testimony, the witness should be advised of the possibility that this question will be asked. Thus, no surprises will develop at the hearing and misunderstandings on the part of the discriminatee will be avoided. Also, if the discriminatee, following an initial decision not to return to the prediscrimination job, formed a later intention to the contrary, this should be brought out in the testimony. In one case, the Board held that backpay would begin to accrue again at the time the initial decision was reversed by the discriminatee.[6]

10740.7 *Rehabilitating Discriminatee Following Examination by Respondent:* Heavy emphasis should be placed on rehabilitating the discriminatee following examination by the respondent. Experience has indicated that any contradictions in the record as a result of such examination are often caused by the confusion or misunderstanding of the discriminatee. In rehabilitating the witness, this factor should be made apparent to the administrative law judge.

By far the greatest number of discriminatees make every effort to tell the truth during their testimony, often bending over backwards so as not to appear to be exaggerating their testimony. It is relatively rare that discriminatees will purposely lie to increase the backpay owing them. The record should be made to reflect this attitude wherever possible. Every effort should be made to present a picture of the discriminatee as a reputable member of the community wherever this is possible. The General Counsel's chances of obtaining a favorable judgment may be impaired if for some reason the record, possibly through inadvertence or neglect, bears an implication that the discriminatee was irresponsible, or disreputable in any way.

10740.8 *Trial Attorney's Attitude Toward Discriminatee as Witness:* A word of caution concerning the trial attorney's attitude toward the discriminatees as witnesses is in order at this point. One distinction between backpay and unfair labor practice hearings is that in the backpay hearing little selection is possible on the part of the trial attorney as to which discriminatee should or should not testify. Some discriminatees will testify badly, answering questions they do not un-

[6] E.g., *English Freight*, 67 NLRB 643, 658 (1946).

derstand, volunteering remarks, contradicting themselves, etc. The attorney's resentment at the shortcomings of these witnesses is understandable. However, no matter how much it is justified, this attitude should be suppressed since it should be understood in advance that such shortcomings will undoubtedly develop. The best possible job should be done with the witnesses at hand.

It should be borne in mind that testifying concerning matters, often quite distant in time, such dates, names, places, and amounts of money earned, places a great strain on the memory of the discriminatees. Experience has shown that some discriminatees are so fearful of testifying that they are perfectly willing to forgo relatively large sums of backpay to avoid the ordeal.

Considering all factors, the trial attorney should make every effort to understand the discriminatee's point of view and present the witness' testimony in its best light.

10742–10744 *Respondent's Case*

10742 *Respondent's Attack on Gross Backpay Computation:* Usually, the respondent's affirmative attack on the General Counsel's gross backpay computation will consist primarily of the testimony of one or more company officials and will be directed at showing that the earnings or hours of "representative" or "replacement" employees selected by the General Counsel were in fact not representative of the probable earnings of the discriminatees.

Another direction often selected will be an attempt to prove that some change in the organization or operations of the gross company terminated the backpay periods for the discriminatees because they would have been laid off at the time the change was made. Often the latter type of contention can be readily shaken by an analysis of the company's records showing that, in fact at the time of the change referred to, the company retained the employees working on the old operation and transferred them to the new function. On the basis of a showing of this kind, it is reasonable to infer that the discriminatees would likewise have been transferred to the new operation and not dismissed as the respondent would claim.

Often correspondence from the respondent will contain information that will have the effect of contradicting testimony presented by a company official.

10744 *Respondent's Attack on Discriminatees*

10744.1 *Contention of Willful Idleness Based on Testimony of Employment Agency:* The respondent will often contend that the discriminatees were willfully idle (i.e., that they had not made a reasonable search for work during the backpay period). Such contentions will often be supported by testimony to indicate the number of jobs available in the labor market during the backpay period.

Testimony of this kind should be completely amplified under cross-examination. To perform this properly, a discussion with officials of the local state employment service should be made in advance of the hearing (see sec. 10720). On cross-examination the respondents' witnesses should be requested to testify concerning the number of applicants in the skill classifications of the discriminatees who remained unplaced by the agency during the backpay period. The number of

such persons who draw their maximum unemployment insurance benefits without obtaining a job should be obtained from the state employment service and placed in the record.

In addition, testimony should oe elicited from the witness concerning the location of job vacancies, the job classifications they consisted of, and the rates of pay offered.[1] If a significant number of such vacancies were at relatively long distances from the homes of the discriminatees, the jobs were such that the discriminatees could not qualify, or the rates of pay were excessively low, it may be argued that the discriminatees were not obliged to apply for or accept them. If the witness is a person who hires for another employer, ask how many applicants are interviewed per job vacancy to be filled.

10744.2 *Introduction in Evidence of Newspaper Advertisements:* Another direction of respondent attack will be introduction in evidence of newspaper advertisements showing the existence of jobs in the classifications of the discriminatees.[2]

In oral argument, or in a brief, it should be pointed out to the administrative law judge that the advertisements normally say little or nothing about wage rates offered or working conditions in the plant or, in many instances, its location, and they do not show how many people applied for the jobs that were advertised. If there were advertisements for 10 jobs and 150 applicants applied, the likelihood of employment for the discriminatees would be extremely small.

10744.3 *Special Problems: Remote and Speculative Defense by Employers:* In some backpay hearings an unduly prolonged hearing and a very unwieldy record may result from the tendency of zealous counsel to press what can be characterized as rather remote and speculative claims to justify affirmative defenses. Such claims often appear most clearly with respect to the use of newspaper advertisements on the willful loss issue, but they often underlie the greater part of the other types of evidence which a respondent may seek to introduce to prove this part of its case. In the interest of keeping the length of the hearing and the record within bounds, the trial attorney may find it advisable to rely on the words of the Supreme Court with reference to the applica-

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[1] E.g., *East Texas Steel Castings Co.*, 116 NLRB 1336, 1354–1355 (1956), enfd. 255 F.2d 284 (5th Cir. 1958); *L.C.C. Resort, Inc.*, 193 NLRB 241, 246–247 (1971).

[2] E.g., *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1709 fn. 18 (1965), enfd. 360 F.2d 569 (5th Cir. 1966); *Florence Printing Co.*, 158 NLRB 775, 792 (1966), enfd. 376 F.2d 216, 221 fn. 8 (4th Cir. 1967).

bility of the "abstractly just doctrine of mitigation of damages" to Board cases as a basis for urging the administrative law judge to place some limits on the evidence that may be admitted on this issue:

> The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. [*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941).][3]

[3] See also *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968), enfg. 153 NLRB 1575 (1965), *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199 (1941), and *Corning Glass Works v. NLRB*, 129 F.2d 967, 973 (2d Cir. 1942).

10770–10772 *Compliance Reports and Action*

10770 *Compliance With Informal Settlements:* The compliance officer should record for the case file all steps taken in compliance. The posture of the case should be such that, with a minimum of oral briefing, the compliance aspects of the case could be transferred to another for handling.

Reports of the compliance officer in cases of informal settlement (see sec. 10146) should be submitted with appropriate recommendations to the Regional Director.

Closing action should be in accord with the requirements of section 10150.3.

10772 *Compliance With Board Order or Court Judgment:* Authorization from the Division of Operations Management to close a case on compliance with a Board order or court judgment is not required except in the following situations:

a. A discriminatee objects to the closing.

b. Cases in which proposed compliance settlements do not meet prescribed standards (sec. 10629).

c. If there are other pending cases involving the respondent. (See sec. 10772.3 when Regional Director may close case administratively without Division of Operations Management clearance.)

This does not preclude the practice of requesting advice from the Division of Operations Management with respect to closing of compliance cases. In addition, there may be unusual circumstances when Washington may have reason to request that a case be submitted for clearance. Note, however, that requests for advice should *not* be submitted on Form NLRB-4582 because this report constitutes the final report on compliance and affirmative position of the Regional Director.

Authorization from the Division of Enforcement Litigation is required to close a case on compliance where court costs have not been paid (sec. 10521).

When contempt or other ancillary proceedings have been instituted, clearance should be secured from the Contempt Litigation Branch prior to closing the case.

10772.1 *Closing Case When Authorization Not Required:* The procedure to be followed in closing cases when a Regional Director is satisfied that full or substantial compliance in accordance with outstanding policies and instructions has been achieved is as follows:

a. *Closing Report:* Submit one copy of Regional Office Closed Case Report (Form NLRB-4582) to Division of Operations Management with a copy of the dated and signed notice that has been posted attached. No covering memorandum or other material is required. Use the Remarks section of Form NLRB-4582 to explain any deviation from full compliance.

b. *Closing Records:* These cases will be closed on the Washington and Regional Office records as of the date of the closed case report.

(In the event of a settlement stipulation calling for Board order and consent court judgment—see secs. 10164–10174—the case should not be closed until after the decree has been entered, despite earlier full compliance.)

c. *Notification to Parties:* Unless an outstanding order in another case is not complied with or for other good cause (see sec. 10772.3) a case is closed administratively, and on the same day the closed case report is issued, the Regional Director will notify the parties by letter of the closing of the case, cautioning that the closing is conditioned on continued observance of the order and that subsequent violations may become the basis of further proceedings.

EXCEPTION: When backpay has been deposited in escrow, notification of case closing to the parties should be held in abeyance pending disbursement of all backpay.

10772.2 *Closing Case When Authorization Required:* This procedure is to be followed by the Region when authorization to close must be obtained from the Division of Operations Management or from the Contempt Litigation Branch:

a. *Closing Report:* Prepare and sign the closed case report in the usual way and indicate approval requested by checkmark in the upper right corner of Form NLRB-4582.

Submit one copy of the report to the Division of Operations Management with copies of the dated and signed notice that has been posted attached, together with a covering memorandum setting forth the position of the objecting party and any other information pertinent to the matter. When contempt or other ancillary proceedings have been initiated, a copy of the closed case report should also be submitted to the Contempt Litigation Branch.

b. *Closing Records:* These cases will be closed on the Washington and Regional Office records as of the date of the authorization from the Division of Operations Management.

c. *Notification to Parties:* On receipt of authorization from the Division of Operations Management, notify the parties of the closing by usual letter wherever such notice is appropriate under section 10772.1.

10772.3 *Closing Case Administratively:* In cases when the Region wishes to close a case administratively, i.e., without notification to the parties, the Regional Director should submit the closed case report, with a memorandum detailing the basis for the recommendation, to the Division of Operations Management, for authorization to close the case administratively. No clearance is required, however, when the Region wishes to close the case administratively because there are other pending cases against the same respondent. Closed case reports should be prepared and Washington and Regional Office records should reflect that the case has been closed either as of the date of the closed case report or the date of authorization to close from the Division of Operations Management, as appropriate. Cases that have been closed administratively should not be reported on Form NLRB-4582 (sec. 10772.1(a)) and should otherwise be regarded as a closed case. In the event of changed circumstances that make it advisable for the Regional Director to notify the parties of the closing of the case, the Regional Director should notify the parties by sending the usual closing letters (sec. 10772.1(c)). The case numbers of any cases previously closed administratively should be included in the closing letters.

10774–10777 *Compliance Cases: Stages; Operational Goals; and Reporting Requirements*

10774 *Stages of Compliance Cases*

10774.1 *Board Order Stage (STAGE 1):* Cases in this stage are defined as those following the issuance and receipt of a Board order or a supplemental Board order that upholds the complaint or backpay specification in whole or in part. A Board order case is removed from Stage 1 when enforcement is recommended or a petition for review is filed, on the closing of the case by the end of the month in which the 80th day occurs, or when a backpay specification issues. Execution and approval of a stipulation waiving enforcement proceedings and providing for the issuance of a backpay specification does not itself toll the running of the 80 days. If a Board order case is referred for enforcement and then formally referred back to the Region by memorandum from Division of Enforcement Litigation, the case reverts to a Stage 1 case.

A petition for rehearing or motion to amend order removes the case from Stage 1 and suspends the running of time until the Board issues its ruling. The running of time is suspended for the period a case is in Washington for advice or other clearance, or following an enforcement recommendation. On the return of the Board order case to the Region, the 80 days will continue to accrue from the date the order was initially received, with a deduction for those days while the case was in Washington.

10774.2 *Court Judgment Stage (STAGE 2):* Cases in this stage are defined as those following the issuance and receipt of a court of appeals enforcement judgment, a contempt judgment, or a Supreme Court judgment. In cases in which the Board's order was only partially enforced, this stage begins with the date that the Region receives notification that the Board will not seek certiorari on that portion of the order that was not enforced. Court judgment cases shall be removed from Stage 2 on the issuance of a backpay specification, on the closing of the case by the end of the month in which the 80th day occurs, or on a recommendation for contempt or supplementary collection proceedings. If contempt or supplementary collection proceedings are recommended, the case reverts to a Stage 2 case if it is formally referred by memorandum from Contempt Litigation back to the Region for appropriate action. However, following the issuance of a contempt

decree, the case shall again enter Stage 2 on receipt of the decree by the Region, and a new 80-day period shall begin. The case is removed from Stage 2 if the respondent has secured a stay of mandate for purposes of a petition for certiorari in the Supreme Court, until the 90-day period for such filing has passed, or it announces abandonment of such intention, whichever is earlier, or until the Supreme Court rules on the petition for certiorari. If no stay of mandate has been granted, the case is considered in Stage 2, and compliance should be sought, notwithstanding that the respondent has filed a petition for certiorari or has indicated its intention to do so.

The running of time for cases in Stage 2 is suspended for the period in which a case is in Waghington for advice or other clearance, or following a recommendation for contempt or supplementary collection proceedings. On the return of the court judgment case to the Region, the 80 days will continue to accrue from the date of the receipt of the court judgment, with a deduction for those days while the case was in Washington or in Contempt. When a stay of mandate has been granted, it shall accrue from the date of receipt of the ruling on the petition for certiorari, or the date of expiration of the 90-day appeal period, or of the respondent's announced abandonment of intent to file.

In some court cases, although compliance has been obtained, the Region may elect to retain the case in an open status because other cases have been filed that may be found to be enforceable under the judgment in the instant case. These cases should be reported as overage subject to being excused.

10775 *Operational Goals*

10775.1 *20-Day Internal Regional Operational Goal:* Notices should be posted within the first 20 days following entry of the case in Stage 1 or 2 (sec. 10774). With respect to cases in which exceptions to administrative law judge decisions are not filed and Board orders automatically issue, Regions should not await entry of a Board order to commence compliance efforts. Such efforts should be undertaken immediately on expiration of the period within which to file exceptions. However, the receipt of an administrative law judge decision or the expiration of the exceptions period does not trigger the running of the operational goals and such cases do not enter Stage 1 until receipt of the Board order.

10775.2 *40-Day Internal Regional Operational Goal:* Reinstatement should be offered the discriminatee(s) and computations of backpay or dues reimbursement should be completed within the first 40 days following entry of the case in Stage 1 or 2 (sec. 10774).

10775.3 *80-Day Operational Goal:* If compliance has been secured and no further legal action is warranted, and closing is otherwise appropriate, cases should be closed and closed case reports (secs. 10772-10772.2) submitted within the first 80 days following entry of the case into Stage 1 or 2 (sec. 10774).

10775.4 *30-Day Operational Goal:* Following issuance of a Board order, recommendation for enforcement proceedings should be made by the Region within 30 days after receipt of the Order by the Region (sec. 10506.2).

However, as soon as it is apparent that the respondent, after affirmative efforts by the Region to produce compliance, is unwilling to comply with the Board's order, recommendations for enforcement should be immediately forthcoming and should not await expiration of the full 30-day period normally set aside for ascertaining whether the respondent is willing to comply with the Board's order. This is especially true in summary judgment 8(a)(5) test of certification cases where it is unlikely that repeated efforts to secure compliance within the full 30-day period will prove successful.

10775.5 *45-Day Operational Goals in Cases Involving Late Award of Court Costs:* In certain court judgment (Stage 2) cases, the court of appeals does not simultaneously issue its judgment awarding court costs with its judgment enforcing the Board's order. Thus, if court costs judgment is received within 35 days of the entry of the case in Stage 2, the costs should be collected within the overall 80-day goal (sec. 10775.3). However, if the court costs judgment is received more than 35 days after receipt of the underlying court judgment, the Region shall have 45 days from receipt of the court costs judgment to collect costs from the respondent or recommend other appropriate action. The 45-day goal does not operate to provide additional time for securing compliance with any other provisions of the court judgment.

10776 *Monthly Overage Compliance Report:* A monthly overage compliance report, Form NLRB-4637, is to be prepared as close to the end of the month as possible for transmittal to the Division of

Operations Management no later than the 5th day of the following month. Submit one copy only. The report must show *all open* Stage 1 and Stage 2 cases in which the Region has not met the 80-day or the 45-day operational goal, *including* any case that may have received an excuse for being overage. Such cases are overage and should continue to be reported overage every month until closed or other action taken to remove the case from that stage. The date of issuance of Board order or court judgment should be noted in the stage date column, as well as the date of receipt by the Region. If the case has been referred to Washington for advice, clearance, or other proceedings, the Region should also indicate, either in the stage column or in an accompanying footnote, the date of referral to Washington and the date returned to the Region so that these days will not be reflected in the total number of days in the stage.

When there are no overage cases at the end of the month in a stage, put a zero in the "Total" column for that stage.

Explanations of why the cases reported are in an overage category are to be submitted as footnotes to the report. For example, the footnote may explain that the case was overage because:

a. Bankruptcy proceedings blocking compliance[1]

b. Backpay being distributed in installments, last payment due (give date); compliance otherwise achieved

c. Washington authorization on (give date) to "freeze" case until action taken by another Federal or state agency/court concerning (give status and nature of other proceedings)

d. Case pending in Division of Operations Management pursuant to submission by Regional Office on (give date)[2]

[1] The excuse should specifically set forth the compliance achieved or the steps taken within the Region's control to achieve compliance, or the reason outside the Region's control why compliance cannot be obtained. For example, backpay has been calculated, proof of claim filed (give date), or no backpay owed. Or notice posted, or the respondent unable to post notice due to cessation of operations. Or reinstatement offered, or reduced work force, employees placed on preferential hiring list, or the respondent unable to offer reinstatement due to cessation of operations.

[2] Submissions in this area would include, for example, cases involving approval of a formal settlement stipulation pertaining to backpay or other compliance issues, requests to administratively close a case or to close a case absent full compliance, and requests for advice or clearance on procedural matters.

e. Case pending in Advice pursuant to submission by Regional Office on (give date)[3]

f. Bargaining order case; notices posted; all other compliance achieved; parties in early stages of bargaining; too early to ascertain if the respondent is bargaining in good faith

g. Court judgment received (give date); compliance achieved in all respects, except court has not yet awarded court costs

h. Court judgment received (give date); compliance achieved in all respects, except court costs awarded by judgment received (give date); 45-day time limit for collecting costs not yet expired

i. Court judgment case referred to Enforcement Litigation on (give date) on issue of collection of court costs

j. On (give date), Region dismissed newly filed charges that alleged noncompliance or new violations against the respondent subject to outstanding Board order (or court judgment). New charges are on appeal (or awaiting expiration of appeal period).[4]

k. Board order case held open although compliance has been obtained, but on (give date) charges were filed against same respondent that may result in enforcement proceedings.[5]

l. Court judgment case held open; compliance has been obtained but on (give date) charges have been filed that may result in contempt proceedings.[6]

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[3] Submissions would include cases submitted to the Division of Advice for substantive, rather than procedural, guidance.

[4] On denial of the appeal or expiration of the appeal period, the Region should close the compliance case.

[5] Excuse should state the status of the charge, i.e. (a) under investigation, or (b) Regional determination to issue complaint, absent settlement. In a merit case, the Region should decide whether to recommend enforcement of the Board order case, notwithstanding compliance; if enforcement is not warranted, the Region should submit the compliance case to the Division of Operations Management with a request to close the case.

[6] Excuse should state the status of the charge, i.e. (a) under investigation, or (b) Regional determination made to issue complaint, and case will be referred to Contempt Litigation. If either Contempt Litigation or the Board, on referral by Contempt Litigation, concludes that contempt proceedings are not warranted, the Region should proceed administratively on the new charge, and it should request authorization to close the court judgment case from Division of Operations Management.

m. Compliance is complete; backpay has been calculated and paid by the respondent; discriminatees cannot be located for payment of backpay.[7]

n. Case excused pursuant to Compliance Manual Section 10777; see attached memorandum.

In each of the foregoing examples, in evaluating performance, the case may be excused at the Washington level. The footnotes should be reviewed and updated in each monthly report to reflect actions taken to secure compliance during the month.

10777 *Report on Scheduled Action in Overage Compliance Cases:* Concurrently with the transmission of the overage compliance report each Region should submit to the Division of Operations Management a schedule of proposed action in each case which, because of extraordinary and involved problems, has been reported overage in the 80-day category on its monthly overage compliance report for 2 successive months. Such cases will be excused during the period processing is conducted within the established time schedules. Although the schedule of action must be tailored to the requirements of each case, the Region should initially state the circumstances distinguishing the case as extraordinary and involved and the actions taken thus far to secure compliance. The schedule should include at least the following steps:

Backpay and Reinstatement Cases

1. Date reinstatement will be offered.

2. Date gross backpay computation will be completed.

3. Date interim earnings computation will be completed.

4. Date backpay will be received or

5. Date backpay specification will be completed, or

[7] Excuse should state the action taken by the Region to locate the discriminatees, e.g., contacts through friends, relatives, or the union, IRS tracing procedure and the date utilized, or newspaper advertising, if appropriate. Excuse should also state steps taken by Region to place missing discriminatees' backpay in escrow. Absent unusual circumstances, a case will not be excused because a discriminatee cannot be located to calculate interim earnings and net backpay, inasmuch as procedures exist to either secure compliance based on a percentage or pro rata share of gross backpay or, absent settlement, a backpay specification can issue alleging gross backpay only.

6. Date further legal action will be recommended (enforcement, contempt, etc.)

7. Any additional or interim steps, including timeframes, which Region intends to take to secure compliance.

Collective-Bargaining Cases

1. Dates of inquiries to be made of the parties concerning status of negotiations

2. Date for closing the case or recommending further legal action

3. Any additional or interim steps, including timeframes, which Region intends to take to secure compliance.

Appropriate schedules of actions should be submitted for other cases involving complex and extraordinary problems, such as hiring hall discrimination cases. In any case, the memo should be revised each month to reflect the actions completed and compliance achieved during the month or the additional steps taken to meet the proposed schedule within the established timeframe.

15004 Alphabetical list of States showing location in relation to regions and subregions. (Note that respective region number follows subregion number to facilitate locating areas serviced.)

Regional and Subregional Nos.
Alabama	10, 15
Alaska	19
Arizona	28
Arkansas	16, 26
California	20, 21, 31, 32
Colorado	27
Connecticut	34
Delaware	4, 5
District of Columbia	5
Florida	12, 15
Georgia	10, 12
Hawaii	S-37(20)
Idaho	19, 27
Illinois	13, 14, 33
Indiana	9, 13, 25
Iowa	17, 18, 33
Kansas	17
Kentucky	9, 25, 26
Louisiana	15
Maine	1
Maryland	5
Massachusetts	1
Michigan	7, 30
Minnesota	18
Mississippi	15, 26
Missouri	14, 17
Montana	19, 27
Nebraska	17, 27
Nevada	28, 32
New Hampshire	1
New Jersey	4, 22
New Mexico	28
New York	2, 3, 29
North Carolina	11
North Dakota	18
Ohio	8, 9
Oklahoma	17

Oregon ..... S-36(19)
Pennsylvania 4, 5, 6
Rhode Island 1
South Carolina 11
South Dakota 18
Tennessee 10, 11, 26
Texas 16, 28
Utah 27
Vermont 1
Virginia 5, 11
Washington ..... 19, S-36(19)
West Virginia 5, 6, 9, 11
Wisconsin 18, 30
Wyoming 27
Puerto Rico 24
U.S. Virgin Islands 24

15010 *Areas Served By Regional and Subregional Offices*

(State and County Coverage)

(Listed in numerical order except that subregions appear directly under respective regions.)

Region 1. Boston, Massachusetts. Services *Maine*, *New Hampshire*, *Vermont*, *Massachusetts*, and *Rhode Island*.

Region 2. New York, New York. In *New York*, services the boroughs of Manhattan and the Bronx in New York City; Orange, Putnam, Rockland, and Westchester Counties.

Region 3. Buffalo, New York. Services all *New York* State Counties except the New York City metropolitan area counties serviced by Regions 2 and 29.

Persons may also obtain service at the resident office located in Albany, New York.

Region 4. Philadelphia, Pennsylvania. In *Pennsylvania*, services Berks, Bradford, Bucks, Carbon, Chester, Columbia, Dauphin, Delaware, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Monroe, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, and Wyoming Counties; in *New Jersey*, services Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Ocean, and Salem Counties; and in *Delaware*, services New Castle County.

Region 5. Baltimore, Maryland. Services *Maryland* and the *District of Columbia*; in *Delaware*, services Kent and Sussex Counties; in *Pennsylvania*, services Adams, Cumberland, Franklin, and York Counties; in *Virginia*, services Accomack, Albemarle, Amelia, Arlington, Augusta, Brunswick, Buckingham, Caroline, Charles City, Chesterfield, Clarke, Culpeper, Cumberland, Dinwiddie, Essex, Fairfax, Fauquier, Fluvanna, Frederick, Gloucester, Goochland, Greene, Greensville, Hanover, Henrico, Highland, Isle of Wright, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenberg, Madison, Mathews, Middlesex, Nelson, New Kent, Northampton, Northumberland, Nottoway, Orange, Page, Powhatan, Prince Edward, Prince

George, Prince William, Rappahannock, Richmond, Rockingham, Shenandoah, Southampton, Spotsylvania, Stafford, Surry, Sussex, Warren, Westmoreland, and York Counties, and the independently incorporated Virginia cities, not part of, but located within or adjacent to, the territory defined by these Virginia counties; and in *West Virginia*, services Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral, Morgan, and Pendleton Counties.

Persons may also obtain service at the resident office located in Washington, D.C.

Region 6, Pittsburgh, Pennsylvania. In *Pennsylvania*, services Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Lawrence, McKean, Mercer, Mifflin, Potter, Somerset, Venango, Warren, Washington, and Westmoreland Counties; and in *West Virginia*, services Barbour, Braxton, Brooke, Calhoun, Doddridge, Gilmer, Hancock, Harrison, Lewis, Marion, Marshall, Monongalia, Ohio, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Webster, Wetzel, Wirt, and Wood Counties.

Region 7, Detroit, Michigan. In *Michigan*, services Alcona, Allegan, Alpena, Antrim, Arenac, Barry, Bay, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Cheboygan, Chippewa, Clare, Clinton, Crawford, Eaton, Emmet, Genesee, Gladwin, Grand Traverse, Gratiot, Hillsdale, Huron, Ingham, Ionia, Iosco, Isabella, Jackson, Kalamazoo, Kalkaska, Kent, Lake, Lapeer, Leelanau, Lenawee, Livingston, Luse, Mackinac, Macomb, Manistee, Mason, Mecoste, Midland, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, St. Clair, St. Joseph, Sanilac, Schoolcraft, Shiawassee, Tuscola, Van Buren, Washtenaw, Wayne, and Wexford Counties.

Persons may also obtain service at the resident office located in Grand Rapids, Michigan.

Region 8, Cleveland, Ohio. In *Ohio*, services Allen, Ashland, Ashtabula, Auglaize, Belmont, Carroll, Columbiana, Coshocton, Crawford, Cuyahoga, Defiance, Delaware, Erie, Fulton, Geauga, Guernsey, Hancock, Hardin, Harrison, Henry, Holmes, Huron, Jefferson, Knox, Lake, Licking, Logan, Lorain, Lucas, Mahoning, Marion, Medina, Monroe,

Morgan, Morrow, Muskingum, Noble, Ottawa, Paulding, Portage, Putnam, Richland, Sandusky, Seneca, Stark, Summit, Trumbull, Tuscarawas, Union, Van Wert, Washington, Wayne, Williams, Wood, and Wyandot Counties.

Region 9. Cincinnati, Ohio. In *Ohio*, services Adams, Athens, Brown, Butler, Champagne, Clark, Clermont, Clinton, Darke, Fairfield, Fayette, Franklin, Gallia, Greene, Hamilton, Highland, Hocking, Jackson, Lawrence, Madison, Meigs, Mercer, Miami, Montgomery, Perry, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Vinton, and Warren Counties; in *Indiana*, services Clark, Dearborn, and Floyd Counties; and in *West Virginia*, services Boone, Cabell, Clay, Fayette, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mingo, Nicholas, Putnam, Raleigh, Roane, Wayne, and Wyoming Counties; and in *Kentucky*, services Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Bullitt, Campbell, Carroll, Carter, Casey, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gellatin, Garrard, Grant, Greenup, Hardin, Harlan, Harrison, Henry, Jackson, Jefferson, Jessamine, Johnson, Kenton, Knott, Knox, Larue, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Marion, Martin, Mason, Meade, Menifee, Mercer, Montgomery, Morgan, Nelson, Nicholas, Oldham, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Spencer, Taylor, Trimble, Washington, Whitley, Wolfe, and Woodford Counties.

Region 10. Atlanta, Georgia. In *Georgia*, services Baker, Baldwin, Banks, Barrow, Bartow, Ben Hill, Berrien, Bibb, Bleckley, Bryan, Bulloch, Burke, Butts, Calhoun, Candler, Carroll, Catoosa, Chatham, Chattahoochee, Chattooga, Cherokee, Clarke, Clay, Clayton, Cobb, Colquitt, Columbia, Cook, Coweta, Crawford, Crisp, Dade, Dawson, De Kalb, Dodge, Dooly, Dougherty, Douglas, Early, Effingham, Elbert, Emanuel, Evans, Fannin, Fayette, Floyd, Forsyth, Franklin, Fulton, Gilmer, Glascock, Gordon, Greene, Gwinnett, Habersham, Hall, Hancock, Haralson, Harris, Hart, Heard, Henry, Houston, Irwin, Jackson, Jasper, Jefferson, Jenkins, Johnson, Jones, Lamar, Laurens, Lee, Liberty, Lincoln, Long, Lumpkin, McDuffie, McIntosh, Macon, Madison, Marion, Meriwether, Miller, Mitchell, Monroe, Montgomery, Morgan, Murray, Muscogee, Newton, Oconee, Oglethorpe, Paulding, Peach, Pickens, Pike, Polk, Pulaski, Putnam, Quitman, Rabun, Randolph, Richmond, Rockdale, Schley, Screven, Spalding, Stephens, Stewart, Sumter, Talbot, Taliaferro, Tattnall, Taylor, Telfair, Terrell, Tift, Toombs,

Towns, Treutlen, Troup, Turner, Twiggs, Union, Upson, Walker, Walton, Warren, Washington, Webster, Wheeler, White, Whitfield, Wilcox, Wilkes, Wilkinson, and Worth Counties; in *Tennessee*, services Anderson, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Grainger, Greene, Hamblen, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, Loudon, McMinn, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sevier, Sullivan, Unicoi, Union, and Washington Counties; and in *Alabama*, services Autauga, Bibb, Blount, Calhoun, Chambers, Cherokee, Chilton, Clay, Cleburne, Colbert, Coosa, Cullman, De Kalb, Elmore, Etowah, Fayette, Franklin, Greene, Hale, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Madison, Marion, Marshall, Morgan, Perry, Pickens, Randolph, St. Clair, Shelby, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, and Winston Counties.

Persons may also obtain service at the resident office located in Birmingham, Alabama.

Region 11. Winston-Salem, North Carolina. Services *North Carolina* and *South Carolina*. In *Tennessee*, services the city of Bristol in Sullivan County; in *Virginia*, services Alleghany, Amherst, Appomattox, Bath, Bedford, Bland, Botetourt, Buchanan, Campbell, Carroll, Charlotte, Craig, Dickenson, Floyd, Franklin, Giles, Grayson, Halifax, Henry, Lee, Mecklenburg, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Russell, Scott, Smyth, Tazewell, Washington, Wise and Wythe Counties, and the independently incorporated Virginia cities, not part of, but located within or adjacent to the territory defined by these Virginia counties; in *West Virginia*, services Greenbriar, Mercer, Monroe, and Summers Counties.

Region 12. Tampa, Florida. In *Florida*, services Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, Dade, De Soto, Dixie, Duval, Flagler, Gadsden, Gilchrist, Glades, Hamilton, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Jefferson, Lafayette, Lake, Lee, Leon, Levy, Madison, Manatee, Marion, Martin, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, St. Johns, St. Lucie, Sarasota, Seminole, Sumter, Suwannee, Taylor, Union, Volusia, and Wakulla Counties; and in *Georgia*, services Appling, Atkinson, Bacon, Brantley, Brooks, Camden, Charlton, Clinch, Coffee, Davis, Decatur, Echols, Glynn, Grady, Jeff, Lanier, Lowndes, Pierce, Seminole, Thomas, Ware, and Wayne Counties.

Persons may also obtain service at the resident offices located in Miami and Jacksonville, Florida.

Region 13. Chicago, Illinois. In *Illinois*, services Cook, Du Page, Kane, Lake, and Will Counties; in *Indiana*, services Lake County.

Region 14. St. Louis, Missouri. In *Illinois*, services Adams, Alexander, Bond, Brown, Calhoun, Christian, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Edgar, Edwards, Effingham, Fayette, Franklin, Gallatin, Greene, Hamilton, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Macoupin, Madison, Marion, Massac, Monroe, Montgomery, Perry, Pike, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Scott, Shelby, Union, Wabash, Washington, Wayne, White, and Williamson Counties; and in *Missouri*, services Audrain, Bollinger, Butler, Callaway, Cape Girardeau, Carter, Clark, Crawford, Dent, Dunklin, Franklin, Gasconade, Iron, Jefferson, Knox, Lewis, Lincoln, Madison, Maries, Marion, Mississippi, Monroe, Montgomery, New Madrid, Oregon, Osage, Pemiscot, Perry, Phelps, Pike, Ralls, Reynolds, Ripley, St. Charles, St. Francois, St. Louis, St. Genevieve, Scotland, Scott, Shannon, Shelby, Stoddard, Warren, Washington, and Wayne Counties, and the Independent City of St. Louis.

Region 15. New Orleans, Louisiana. Services *Louisiana*. In *Mississippi*, services Adams, Amite, Claiborne, Clarke, Copiah, Covington, Forrest, Franklin, George, Greene, Hancock, Harrison, Hinds, Issaquena, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Kemper, Lamar, Lauderdale, Lawrence, Leake, Lincoln, Madison, Marion, Neshoba, Newton, Pearl River, Perry, Pike, Rankin, Scott, Sharkey, Simpson, Smith, Stone, Walthall, Warren, Wayne, Wilkinson, and Yazoo Counties; in *Alabama*, services Baldwin, Barbour, Bullock, Butler, Choctaw, Clarke, Coffee, Conecuh, Covington, Crenshaw, Dale, Dallas, Escambia, Geneva, Henry, Houston, Lowndes, Macon, Marengo, Mobile, Monroe, Montgomery, Pike, Russell, Washington, and Wilcox Counties; and in *Florida*, services Bay, Calhoun, Escambia, Franklin, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, and Washington Counties.

Region 16. Fort Worth, Texas. Services the entire State of *Texas* with the exception of El Paso, Culberson, and Hudspeth Counties. In *Arkansas*, services Miller County.

Persons may also obtain service at the resident offices located in Houston and San Antonio, Texas.

Region 17. Kansas City, Kansas. Services *Oklahoma* and *Kansas*. In *Missouri*, services Adair, Andrew, Atchison, Barry, Barton, Bates, Benton, Boone, Buchanan, Caldwell, Camden, Carroll, Cass, Cedar, Chariton, Christian, Clay, Clinton, Cole, Cooper, Dade, Dallas, Daviess, De Kalb, Douglas, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Howell, Jackson, Jasper, Johnson, Laclede, Lafayette, Lawrence, Linn, Livingston, McDonald, Macon, Mercer, Miller, Moniteau, Morgan, Newton, Nodaway, Ozark, Pettis, Platte, Polk, Pulaski, Putnam, Randolph, Ray, St. Clair, Saline, Schuyler, Stone, Sullivan, Taney, Texas, Vernon, Webster, Worth, and Wright Counties; in *Iowa*, services Fremont, Mills, and Pottawattamie; and in *Nebraska*, services Adams, Antelope, Arthur, Blaine, Boone, Boyd, Brown, Buffalo, Burt, Butler, Cass, Cedar, Chase, Cherry, Clay, Colfax, Cuming, Custer, Dakota, Dawson, Dixon, Dodge, Douglas, Dundy, Filmore, Franklin, Frontier, Furnas, Gage, Garfield, Gosper, Grant, Greeley, Hall, Hamilton, Harlan, Hayes, Hitchcock, Holt, Hooker, Howard, Jefferson, Johnson, Kearney, Keith, Keya Paha, Knox, Lancaster, Lincoln, Logan, Loup, McPherson, Madison, Merick, Nance, Nemaha, Nuckolls, Otoe, Pawnee, Perkins, Phelps, Pierce, Platt, Polk, Red Willow, Richardson, Rock, Saline, Sarpy, Saunders, Seward, Sherman, Stanton, Thayer, Thomas, Thurston, Valley, Washington, Wayne, Webster, Wheeler, and York Counties.

Persons may also obtain service at the resident office located in Tulsa, Oklahoma.

Region 18. Minneapolis, Minnesota. Services *North Dakota*, *South Dakota*, and *Minnesota*. In *Iowa*, services Adair, Adams, Allamakee, Appanoose, Audubon, Benton, Black Hawk, Boone, Bremer, Buchanan, Buena Vista, Butler, Calhoun, Carroll, Cass, Cedar, Cerro Gordo, Cherokee, Chickasaw, Clarke, Clay, Clayton, Crawford, Dallas, Davis, Decatur, Delaware, Dickinson, Emmet, Fayette, Floyd, Franklin, Greene, Grundy, Guthrie, Hamilton, Hancock, Hardin, Harrison, Henry, Howard Humboldt, Ida, Iowa, Jasper, Jefferson, Johnson, Jones, Keokuk, Kossuth, Linn, Lucas, Lyon, Madison, Mahaska, Marion, Marshall, Mitchell, Monona, Monroe, Montgomery, O'Brien, Osceola, Page, Palo Alto, Plymouth, Pocahontas, Polk, Poweshiek, Ringgold, Sac, Shelby, Sioux, Story, Tama, Taylor, Union, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Winnebago, Winne-

shiek, Woodbury, Worth, and Wright Counties; in *Wisconsin*, services Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Eau Claire, Iron, Jackson, Pepin, Pierce, Polk, Price, Rusk, St. Croix, Sawyer, Taylor, Trempealeau, and Washburn Counties.

Persons may also obtain service at the resident office located in Des Moines, Iowa.

Region 19. Seattle, Washington. Services *Alaska*, *Montana*, *Idaho*, and all counties in *Washington* except Clark. In *Idaho*, services Adams, Benewah, Bonner, Boundary, Clark, Clearwater, Custer, Fremont, Idaho, Kootenai, Latah, Lemhi, Lewis, Nex Perce, Shoshone, and Valley Counties; and in *Montana*, services Beverhead, Broadwater, Cascade, Deer, Lodge, Flathead, Gallatin, Glacier, Granite, Jefferson, Lake, Lewis and Clark, Liberty, Lincoln, Madison, Meagher, Mineral, Missoula, Pondera, Powell, Revalli, Sanders, Silver Bow, Teton, and Toole Counties.

Subregion 36. Portland, Oregon. Services *Oregon*. In *Washington*, services Clark County.

Persons may also obtain service at the resident office located in Anchorage, Alaska.

Region 20. San Francisco, California. In *California*, services Butte, Colusa, Del Norte, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Napa, Nevada, Placer, Plumas, Sacramento, San Francisco, San Mateo, Shasta, Sierra, Siskiyou, Solano, Sonoma, Sutter, Tehama, Trinity, Yolo, and Yuba Counties.

Subregion 37. Honolulu, Hawaii. Services *Hawaii*.

Region 21. Los Angeles, California. In *California*, services Imperial, Orange, Riverside, and San Diego, and that portion of Los Angeles County lying east of Harbor Freeway and Gaffey Street, south and east of Pasadena Freeway and Arroyo Parkway, and south of Foothill Freeway and Baseline Road (State Route 30).

Persons may also obtain service at the resident office located in San Diego, California.

Region 22. Newark, New Jersey. In *New Jersey*, services Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union, and Warren Counties.

Region 24. Hato Rey, Puerto Rico. Services *Puerto Rico* and the *U.S. Virgin Islands*.

Region 25. Indianapolis, Indiana. Services *Indiana*, with the exception of Lake, Clark, Dearborn, and Floyd Counties; in *Kentucky*, services Daviess and Henderson Counties.

Region 26. Memphis, Tennessee. Services all of *Arkansas* except for Miller County. In *Tennessee*, services Bedford, Benton, Bledsoe, Cannon, Carroll, Cheatham, Chester, Clay, Coffee, Crockett, Davidson, Decatur, De Kalb, Dickson, Dyer, Fayette, Fentress, Franklin, Gibson, Giles, Grundy, Hardeman, Hardin, Haywood, Henderson, Henry, Hickman, Houston, Humphreys, Jackson, Lake, Lauderdale, Lawrence, Lewis, Lincoln, Marion, McNairy, Macon, Madison, Marshall, Maury, Montgomery, Moore, Obion, Overton, Perry, Pickett, Putnam, Robertson, Rutherford, Sequatchie, Shelby, Smith, Stewart, Sumner, Tipton, Trousdale, Van Buren, Warren, Wayne, Weakley, White, Williamson, Wilson Counties; in *Mississippi*, services Alcorn, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Clay, Coahoma, De Soto, Grenada, Holmes, Humphreys, Itawamba, Lafayette, Lee, Leflore, Lowndes, Marshall, Monroe, Montgomery, Noxubee, Oktibbeha, Panola, Pontotoc, Prentiss, Quitman, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Washington, Webster, Winston, and Yalobusha Counties; and in *Kentucky*, services Adair, Allen, Ballard, Barren, Breckenridge, Butler, Caldwell, Calloway, Carlisle, Christian, Clinton, Crittendon, Cumberland, Edmondson, Fulton, Graves, Grayson, Green, Hancock, Hart, Hickman, Hopkins, Livingston, Logan, Lyon, Marshall, McCracken, McLean, Metcalfe, Monroe, Muhlenberg, Ohio, Russell, Simpson, Todd, Trigg, Union, Warren, Wayne, and Webster Counties.

Persons may also obtain service at the resident offices located in Little Rock, Arkansas, and in Nashville, Tennessee.

Region 27. Denver, Colorado. Services *Wyoming*, *Colorado*, and *Utah*. In *Nebraska*, services Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux Counties; in *Idaho*, services Ada, Bannock, Bear Lake, Bingham, Blaine, Boise,

Bonneville, Butte, Camas, Canyon, Caribou, Cassia, Elmore, Franklin, Gem, Gooding, Jefferson, Jerome, Lincoln, Madison, Minidoka, Oneida, Owyhee, Payette, Power, Teton, Twin Falls, and Washington Counties; and in *Montana*, services Big Horn, Blaine, Gargon, Carte, Chouteau, Custer, Daniels, Dawson, Fallon, Fergus, Garfield, Gold Valley, Hill, Judith Basin, McCone, Musselshell, Park, Petroleum, Phillips, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan, Stillwater, Sweetgrass, Treasure, Valley, Wheatland, Wibaux, and Yellowstone Counties.

Region 28. Phoenix, Arizona. Services *Arizona* and *New Mexico*. In *Texas*, services Culberson, El Paso, and Hudspeth Counties; and in *Nevada*, services Nye, Lincoln, and Clark Counties.

Persons may also obtain service at the resident offices located in Albuquerque, New Mexico; El Paso, Texas; and Las Vegas, Nevada.

Region 29. Brooklyn, New York. In *New York*, services the borough of Queens.

Region 30. Milwaukee, Wisconsin. In *Wisconsin*, services Adams, Brown, Calumet, Columbia, Crawford, Dane, Dodge, Door, Florence, Fond du Lac, Forest, Grant, Green, Green Lake, Iowa, Jefferson, Juneau, Kenosha, Kewaunee, La Crosse, Lafayette, Langlade, Lincoln, Manitowoc, Marathon, Marinette, Marquette, Menominee, Milwaukee, Monroe, Oconto, Oneida, Outagamie, Ozaukee, Portage, Racine, Richland, Rock, Sauk, Shawano, Sheboygan, Vernon, Vilas, Walworth, Washington, Waukesha, Waupaca, Waushara, Winnebago, and Wood Counties; in *Michigan*, services Alger, Baraga, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Marquette, Menominee, Ontonagon Counties.

Region 31. Los Angeles, California. In *California*, services Inyo, Kern, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura Counties that portion of Los Angeles County lying west of Harbor Freeway and Gaffey Street, north and west of Pasadena Freeway and Arroyo Parkway, and north of Foothill Freeway and Baseline Road (State Route 30).

Region 32. Oakland, California. In *California*, services Alameda, Alpine, Amador, Calaveras, Contra Costa, El Dorado, Fresno, Kings, Madera, Mariposa, Merced, Mono, Monterey, San Benito, San Joaquin,

Santa Clara, Santa Cruz, Stanislaus, Tulare, Tuolumne Counties; and in Nevada, services Churchill, Douglas, Elko, Esmeralda, Eureka, Humboldt, Lander, Lyon, Mineral, Ormsby, Pershing, Storey, Washoe, and White Pine Counties.

Region 33, Peoria, Illinois. In *Illinois*, services Boone, Bureau, Carroll, Cass, Champaign, De Kalb, De Witt, Douglas, Ford, Fulton, Grundy, Hancock, Henderson, Henry, Iroquois, Jo Daviess, Kankakee, Kendall, Knox, La Salle, Lee, Livingston, Logan, Macon, Marshall, Mason, McDonough, McHenry, McLean, Menard, Mercer, Morgan, Moultrie, Ogle, Peoria, Piatt, Putnam, Rock Island, Sangamon, Schuyler, Stark, Stephenson, Tazewell, Vermilion, Warren, Whiteside, Winnebago, and Woodford Counties, and in *Iowa*, services Clinton, Des Moines, Dubuque, Jackson, Lee, Louisa, Muscatine, and Scott Counties.

Region 34, Hartford, Connecticut. Services *Connecticut*.

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